Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
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	)	
	)	CC Docket No. 02-33
Appropriate Framework for Broadband Access to the Internet over Wireline Facilities	)	
	)	
Universal Service Obligations of Broadband Providers	)	CC Docket Nos. 95-20, 98-10
	)	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements	)	

COMMENTS OF DIRECTV BROADBAND, INC

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Dated: May 3, 2002

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DIRECTV BROADBAND, INC.

DIRECTV Broadband, Inc. ("DIRECTV Broadband") submits these comments in response to the above-captioned Notice of Proposed Rulemaking[1] concerning the appropriate regulatory framework for broadband access to the Internet over wireline facilities.[2] DIRECTV Broadband is a broadband service provider ("BSP") that offers retail high-speed DSL-based broadband services such as Internet access, e-mail, web-hosting, multiple computer networking services, virus and security services, and, in the future, other interactive and consumer-focused

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[1] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Notice of Proposed Rulemaking*, CC Docket No. 02-33, FCC 02-33, released February 15, 2002 ("*NPRM*")

[2] DIRECTV Broadband is a subsidiary of Hughes Electronics Corporation. DIRECTV, Inc., a separate subsidiary of Hughes Electronics Corporation is a leading provider of competitive video services to residential consumers nationwide.

broadband services and applications including home automation and monitoring services. DIRECTV Broadband provides these services to over 110,000 residential customers nationwide in 146 Metropolitan Areas and is one of the largest non-ILEC affiliated BSPs in the country. DIRECTV Broadband provides service by means of last-mile wholesale xDSL connectivity and transport, purchased largely from incumbent local exchange carriers ("ILECs"), including BellSouth, SBC, Qwest and Verizon, and, where possible, from CLECs such as MCI WorldCom.

I. INTRODUCTION AND SUMMARY

In the *NPRM*, the Commission announces for the first time that promotion of broadband services to all Americans is now its primary goal. DIRECTV Broadband applauds this recognition by the Commission of the potential of innovative services delivered over broadband infrastructure to consumers and businesses. The Commission should carefully evaluate any possible steps it may be contemplating in light of legitimate concerns over ILEC policies that discriminate against independent BSPs in favor of ILEC affiliates. As explained in these comments, ILECs are seeking to impose a variety of technical and other limitations on last-mile DSL connectivity purchased by BSPs that will thwart BSPs' ability to provide innovative services to consumers and businesses. Rather than possible deregulatory steps, which would in any event exceed the statutory authority of the Commission, the Commission should address ILEC policies that favor ILEC-affiliated BSPs, and changes to DSL speed, pricing and architecture that harm consumer interests.

DIRECTV Broadband is concerned that this rulemaking, as well as certain related broadband proceedings,[3] may erroneously remove key Title II obligations from the near-monopoly incumbent providers of last-mile connectivity in the mistaken view that this would promote the goal of access to broadband services to all Americans. In fact, as will be detailed herein, the possibility encompassed within the *NPRM* that some or all broadband transmission capability deployed by wireline common carriers would not be subject to Title II, or available to competing ISPs, would not promote (but would instead limit) the provision of broadband services to all Americans. For the reasons set forth herein, the removal of ILEC broadband transmission capability from the Title II regulatory framework would merely cement the existing ILEC control over the last-mile infrastructure and grant leave to the resulting incumbent practices of thwarting intramodal and intermodal competition, stifling network improvements and ultimately undermining the Commission's goals of widespread broadband access.

The Commission, in order to promote its broadband goals, should reaffirm that the broadband infrastructures and capabilities owned and operated by ILECs are, and will continue to be, subject to Title II, all of the pro-competitive obligations of the 1996 Act, and *Computer Inquiry* unbundling obligations. The broadband competition that these regulatory requirements make possible *despite* continuing control over essential facilities by ILECs will itself help meet

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[3] *See e.g. In the Matter of Performance Measurements and Standards for Unbundled Network Elements and Interconnection*, CC Docket No. 01-138, FCC 01-331. *See also In the Matter of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket No. 01-388, FCC 02-991. *Furthermore see In re Inquiry Concerning High-Speed Access to the Internet over Cable and other Facilities,* Declaratory Ruling and Notice of Further Rulemaking, GN Docket 00-185, FCC 02-97.

the Commission's broadband goals by encouraging the deployment of advanced services by competitive providers as well as ILEC broadband affiliates.

Regardless of the merits of the *Cable Modem Declaratory Ruling,* there is no basis for extending the reasoning of that decision to wireline broadband Internet access service. As the Commission recognized in the *Cable Modem Declaratory Ruling*, the fact that common carriers have been subject for many years to Title II obligations requiring the unbundling of the underlying transmission capabilities used to provide information services over their own networks categorically distinguishes them from cable operators.

As an initial matter, the Commission needs to continue to distinguish between telecommunications infrastructure elements providing sufficient bandwidth to carry broadband, and the information content provided over these infrastructures, rather than concluding that such bundled offerings constitute a unitary "information service." Facilities-based wireline broadband Internet access service is a bundled offering of a telecommunications service, subject to Title II, *and* an information service. In contrast, non-facilities-based BSPs, like DIRECTV Broadband, merely use telecommunications services obtained from others, and therefore provide only information services, as the FCC has previously found.

Facilities-based wireline broadband Internet access service in large part provides to the customer no more than a transparent transmission path to third party content providers in the same way that the voice network provides a pathway for end users to obtain various third party-provided audiotext information sources such as stock quotes and banking information. In fact, end users demand and expect that the service provider will *not* change the format or content of information received from third party sources. Thus, while wireline broadband Internet access service providers need to *use* telecommunications to provide information services, such as access

to email stored on the provider's server, they also provide a pure transmission path to the Internet, in which the transmitted content is entirely between users and third parties, without the BSP altering either the form or content of the information are sent and received. Thus, it should be evident that wireline broadband Internet access is *not* a seamless, unitary service because the transparent transmission path is functionally separate from information services and is perceived as such by end users.

The Commission already has asserted Title II jurisdiction over the transmission component of wireline broadband Internet access service. Under *Computer Inquiry* requirements, which the *NPRM* correctly declares apply to ILECs, ILECs may, for example, use their own DSL transmission services to offer wireline broadband services, but are also required to make such DSL transmission services available to other BSPs on a nondiscriminatory basis. Particularly since – as will be discussed in more detail in the following – the ILECs own and control the quintessential facilities – the local loop –the Act requires that this transmission element be subject to Title II.

It is hard to imagine a more compelling public interest justification for application of Title II obligations to ILEC broadband capability. The ability of independent BSPs to obtain basic network functions, particularly for last-mile connections on a nondiscriminatory basis has been the foundation for the growth and success of the Internet and its attendant public interest benefits. Permitting ILECs to discriminate in favor of their own BSP operations beyond even the discriminatory practices engaged in under current regulations threatens to permit ILECs to extend their monopoly control of the loop to the unregulated information services marketplace, which for 25 years the Commission has sought successfully to avoid.

An overwhelming public interest benefit of preserving the Title II obligation that ILECs offer as a telecommunications service to competitors the broadband capability that they use for their own Internet access service is that this would assure BSPs of non-discriminatory access of last-mile connectivity to end users.

Elimination of Title II regulation of ILEC broadband capability is not necessary in order to permit ILECs to compete intermodally. ILECs are currently permitted to compete and provide broadband information services through their affiliated BSPs who are also customers of their own tariffed broadband telecommunications services. These ILEC-affiliated BSPs have succeeded spectacularly, experiencing record breaking growth in DSL subscribership. The Commission should fashion a deregulatory framework for wireline broadband by retaining Title II authority and deregulating as appropriate, rather than attempting to do so by sweeping all of wireline broadband into Title I. Rather, and in keeping with the goals of the 1996 Act, the Commission should engage in targeted regulatory reform to bring about establishment of an intermodal level playing field for broadband access by applying Title II to all broadband platforms and forbearing or waiving rules where appropriate.

In furtherance of this goal, and to reinvigorate the faltering status of competition for local connectivity, the Commission should retain and strengthen *Computer III* safeguards against discrimination. The *NPRM* does not make a compelling case that conditions have changed to permit elimination of *Computer III* safeguards. The *NPRM's* statements that those safeguards were somehow limited to the voice network are incorrect. The Commission in *Computer III* stated that it intended to, and did, fashion a framework that could accommodate the evolution of the network to a more advanced capability. Thus, key *Computer III* safeguards are not technology-specific. Instead, they are broad anti-discrimination requirements that can be, and

are, equally applied in a narrowband or broadband environment. In particular, the requirement that ILECs provide Internet access as customers of their own tariffed services also available to competing BSPs is fully at home and necessary in a wireline broadband environment.

The Commission should specifically limit relaxation of regulatory requirements in DSL to those instances where the ILECs demonstrate concrete steps toward making the DSL connectivity they offer to independent BSPs a neutral, stable, and efficient platform for the delivery of wireline broadband services to consumers. Despite well-founded concerns over ILEC initiatives such as SBC's BCG program, more recent initiatives by SBC and other ILECs may indicate a new recognition that healthy independent retail BSPs will play an important role in driving broadband demand.

The Commission should conclude this proceeding by reaffirming that ILECs' broadband capability is fully subject to Title II and *Computer Inquiry* safeguards and adopting rules that strengthen protections for the ILECs' independent retail BSPs, while relaxing regulatory barriers in only those instances where the ILECs have adopted consumer-oriented policies and where eliminating barriers would create *demonstrable* efficiencies benefiting ILECs, BSPs and consumers alike.

II. THE COMMISSION SHOULD EVALUATE ISSUES IN THIS PROCEEDING IN LIGHT OF PERSISTENT CONCERNS THAT ILEC POLICIES DISCRIMINATE AGAINST UNAFFILIATED BSPs

As discussed herein and in comments filed in the Commission's *Computer III Further Remand* proceeding, the experiences of independent BSPs reflect the need for stricter

enforcement of existing safeguards and *Computer Inquiry* requirements,[4] rather than the weakening or abandonment of this regulatory framework. ILECs continue to use their dominant power over bottleneck facilities and services to impede competition by independent BSPs.

A. Independent Wireline Broadband Access Providers are Dependent on ILEC Access Last-Mile Infrastructures to Offer Service

ILECs control the overwhelming majority of DSL access lines in most regions. The large ILECs clearly remain dominant in the provision of *wholesale* broadband customer access to facilities-based Internet service providers under any definition of broadband. Notwithstanding any broadband competition from cable and other modes of broadband delivery at the retail level, only very limited competition remains in the unique market for wholesale DSL connectivity, particularly subsequent to the decrease in the number of CLEC providers in the past year. In many communities, the ILEC is the only remaining provider of last-mile broadband connectivity available to independent BSPs. Consequently, in those communities, an independent BSP has no alternative to the ILECs for last-mile connectivity. If the Commission adopts policies that eliminate access to such ILEC connectivity, DIRECTV Broadband would, in many cases, be unable to provide wireline broadband services to local consumers.

Furthermore, even where local alternatives for last-mile broadband connectivity do exist, economies of scale mandate that independent broadband Internet access service providers utilize suppliers that can offer the widest possible geographic coverage over a consistent set of technical parameters. While desirable, the addition of each new supplier of access services requires

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[4] Comments of the United States Internet Service Providers Alliance, CC Docket Nos. 95-20, 98-10 (filed April 16, 2001) ("USISPA Comments"); Reply Comments of the Texas Internet Service Providers Association, CC

DIRECTV Broadband or any other similarly situated independent BSP to make a significant investment in adapting to the new carriers' technical standards and ordering systems, as well as to incurr the additional expense of transport circuits to connect to each carrier's network.[5] Therefore, DIRECTV Broadband and other BSPs remain highly dependent on last-mile connectivity provided by the ILECs – even as they compete with ILEC-affiliated BSPs.

B. Unaffiliated Wireline Broadband Service Providers Receive Poor and Discriminatory Provisioning of Wholesale DSL Connectivity From ILECs

DIRECTV Broadband has, and continues to experience serious and significant problems from inadequate and last-mile provisioning by ILEC suppliers. Information is not available publicly that might show whether ILEC-affiliated BSPs suffer the same level of false positive and false negative responses to loop qualification inquiries[6] or other problems, but lines are often provisioned only after exceptional difficulty and delays. If ILEC ISPs obtained lines at the same pace under which lines were historically provisioned for DirecTV Broadband, they never could have amassed the hundreds of thousands of DSL lines the ILEC-affiliated BSPs now have in service. Notably, for instance, during the Summer of 2000, SBC's public disclosures indicated

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Docket Nos. 95-20, 98-10 (filed April 30, 2001) ("TISPA Comments").

[5] In addition, DIRECTV Broadband has suffered significant expense, disruption, and customer frustration as some of its CLEC DSL connectivity providers have disappeared from the market. DIRECTV Broadband utilized each of the earlier-listed ILECs as well as Rhythms and NorthPoint during 2001. Both Rhythms and NorthPoint filed for bankruptcy protection last year. Recently, DIRECTV Broadband began working with Rhythms successor MCI WorldCom.

[6] "False positives" occur where the ILEC informs the BSP that a DSL connection can be established for a specific address and telephone number, but after the order has been placed, informs the BSP that a DSL connection cannot actually be provisioned over the particular loop. "False negatives" indicate that customers cannot be provisioned when in fact they could be.

that it installed one order for every 18 orders delivered by its affiliated BSP, while at the same time SBC made only one installation for every 580 orders delivered by DIRECTV Broadband.

On an inordinate number of occasions, DIRECTV Broadband is informed that an order cannot be accommodated because no loops and/or DSLAM ports are available, or that provisioning is contingent on payment for loop conditioning. Repairs are slow, and often ILEC maintenance personnel do not show up for appointments. Lack of adequate access to accurate loop make-up and pre-qualification information is a chronic problem that seriously hinders DIRECTV Broadband's ability to offer competitive services.

In contrast, given the success in bringing up service for hundreds of thousands of customers for the ILECs' affiliated BSPs, we must conclude that affiliated operations have enjoyed superior superior quality provisioning and access to information. DIRECTV Broadband tracks performance for its ILEC suppliers closely and can report today that progress is ongoing in each area of concern to DIRECTV Broadband. Nevertheless, DIRECTV Broadband refers the Commission to its comments in the ILEC performance metrics proceeding for examples of the sorts of performance measures and standards that might substantially further the ubiquitous availability of broadband services.[7]

In this connection, it is also worth noting that ILEC ISPs, which have held only a single digit percentage of the dial-up ISP market, have been able to capture as much as 80% or more of retail DSL customers, even though they started offering these services later than many

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[7] *See* In the Matter of Performance Measurements and Standards for Interstate Special Access Services, CC Docket No. 01-321, FCC 01-339.

competitive providers and provided only a very small percentage of the dial-up access services that preceded broadband.[8] This massive shift from the highly competitive dial-up Internet service market to an ILEC-dominated wireline broadband Internet access market should at a minimum heighten concern that market forces alone may not be adequate to police ILEC discriminatory practices, and strongly caution against abandoning provision of wireline broadband Internet access to the ILEC's own devices, except where the ILEC can demonstrate that BSP and other user concerns have been met and addressed and will continue to be addressed in the future and where BSPs concur in that assessment.

C. ILECs have Engaged in Anti-Competitive Practices Which Tend to Harm Competition in Wireline Broadband Internet Service

ILECs' near-total control of the last mile and related transmission infrastructures necessary for the provision of broadband Internet access service has resulted in numerous and ongoing abuses damaging not only to providers like DIRECTV Broadband, but ultimately to the public interest in ubiquitous broadband availability. Without going into detail, classic monopoly stratagems like "price squeezing" in favor of affiliated interests, superior access to support systems, joint marketing abuses (ILEC-affiliated ISPs obtain advanced notice of the availability of broadband facilities for marketing advantage, as well as preferential access to essential facilities with limited availability), and misuse of CPNI are widespread and by themselves warrant retaining the broadband transmission component of wireline broadband Internet access service within the ambit of common carriage regulation.

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[8] In SBC's incumbent territory, for example, more than 80% of SBC's DSL access lines are provisioned to SBC-affiliated ISPs. SBC Investor Briefing No. 225, http://www.sbc.com/Investor/Financial/

Just one example of how ILECs provisioning of wholesale last-mile broadband transmission capability burden independent broadband Internet providers with unneccessary and unproductive expenses is through limited access to poor loop qualification information. The Commission has previously recognized the importance of obtaining timely and accurate loop qualification information needed to provide broadband Internet connectivity – particularly where ILEC affiliated Internet service providers receive higher-quality loop information on a more timely basis relative to their independent competitors do from the same source. Broadband Internet providers like DIRECTV Broadband require nondiscriminatory access to loop qualification information to market and provide their DSL-based broadband services to prospective customers. The sole source of loop qualification information is the ILECs, who exclusively manage that network. Unequal access and the provision of erroneous information accounts to a large extent for consumer frustration in trying to obtain broadband Internet access over wireline facilities from BSPs. Often, DIRECTV Broadband either cannot respond to customer inquiries as a result of downtime of the ILEC loop information systems; is unable to provision a customer as a result of false positive loop qualification reports for last-mile transport which only later turns out to be unavailable or unsuitable for broadband service; or must unnecessarily decline a customer request for broadband Internet service because of a false positive ILEC report precluding use of a connection to the home where such loop actually *is* available and suitable. All of these errors are caused by the ILEC.

Earning_Info/ docs/1Q_1B_FINAL.pdf, at 4 (Apr. 23, 2001).

DIRECTV Broadband must be able to match the ability of ILEC-affiliated ISPs to offer real-time, always available responses to consumers as to whether they are able to order wireline broadband Internet service to their home. For these reasons, DIRECTV Broadband urges the Commission in this and related proceedings to strengthen Title II regulation of the transmission requirement of wireline broadband Internet access service. As the commercial success of ILEC-affiliated broadband Internet service providers demonstrates, the minimal regulatory burden of Title II allows ILEC providers to roll out wireline broadband services, while under-regulation and under-enforcement stifle and delay ability of BSPs to provide such services.

D. ILEC Restrictions on Access to Essential Broadband Transmission Capability are Stifling the Deployment of Innovative Wireline Broadband Services and Harming Consumers

Other ILEC practices stifle or prevent the deployment of innovative services by BSPs. Two of the most egregious examples are the ILEC practices of imposing "de-tuning" and the single point-per-LATA transport circuit requirements. Thus, several ILECs are attempting to impose, over the objections of broadband providers, use of PPP over Ethernet, or "PPPoE." This new protocol would eliminate the "always on" nature of DSL connectivity, meaning that it will change fundamentally what DSL connectivity is today and terminate the capability of DSL to support any service that requires a consistent network presence at the consumer's residence. PPPoE would foreclose the possibility of using DSL to support, for example, home security and monitoring services that require network-initiated communication with equipment at the customer premises and would, likewise, eliminate IP telephony services that require an "always-on" connection in order to reach a customer. Lack of Commission standards and enforcement that address ILECs' ability to unilaterally impose unnecessary technical limitations harms the Commission's announced goals for innovative broadband services and applications.

Likewise, as ILECs have obtained long distance authority under Section 271 of the Act in an increasing number of states, and hence can carry traffic between LATAs in a state or region, ILECs continue to require broadband Internet access providers to purchase a separate data transport circuit into each LATA. Data transport represents a little recognized but critical component of the cost structure associated with delivering wireline broadband services. While this single point-per LATA requirement conforms to Commission rules prior to obtaining long-distance authority, the ILECs have been only too happy to maintain this regulation beyond the time they gain Section 271 authority, imposing unnecessary expenses on BSPs and consumers alike, while generating a benefit only for the ILEC. Additionally, the economics of this arrangement significantly limit the ability of BSPs to serve less densely distributed consumer communities, and hence slows the availability of broadband for many such communities.

Until recently, no ILEC would agree to the sensible policy of facilitating the delivery of DSL traffic to an Egress Circuit utilized by more than one ISP. Under the predominant model, each BSP is required to maintain its own separate Egress Circuit in each LATA where a customer resides, even though the efficient method of transport from that LATA to BSPs would be to share Egress Circuits among BSPs whose Egress Circuits would otherwise be underutilized ("Aggregated Transport"). Egress Circuits utilize ATM transport protocol which is specifically designed to make this kind of traffic aggregation possible.

The ILEC policies requiring separate Egress Circuits meant that the larger, ILEC-affiliated BSPs enjoyed the highest likelihood of efficiently utilizing expensive Egress Circuits in most locations, meaning that in many cases break-even in a particularly community could only be achieved by the ILEC-affiliated BSP because the ILEC imposed this artificial prohibition on traffic aggregation. The obvious solution that a neutral supplier, hoping to entice more BSPs to

market services in a given community would have not only identified itself, but implemented on its own initiative, would be to make sure that several smaller BSPs could share a single circuit and achieve efficiencies as soon as possible. This would of course allow them to compete more effectively with the larger ILEC-affiliated BSPs. The ILECs' uniform failure to grasp this problem and initiate a resolution should not be considered incidental to the Commission's inquiry here.

This situation persisted until just prior to this filing, when SBC Advanced Solutions, Inc. ("SBC-ASI") and Verizon agreed to support Aggregated Transport. If other ILECs follow SBC-ASI's lead and support aggregation,[9] it could represent a significant step forward in the drive top create a BSP-neutral DSL platform. It should also be noted to these ILECs' credit that Aggregated Transport should initially cause a reduction in revenue as BSPs eliminate their separate Egress Circuits into the ILEC ATM network. SBC-ASI has said that it seems the short-term revenue loss worthwhile if Aggregated Transport drives greater demand for DSL connectivity through better economics at the retail level and wider BSP coverage.

The next logical step, should the ILECs uniformly implement Aggregated Transport, would be to extend the efficiencies captured at the intraLATA level to capturing similar efficiencies available at the interLATA level. Presumably, where an ILEC is permitted to carry traffic to BSPs across LATA boundaries pursuant to Section 271, the same efficiencies captured by aggregating BSP traffic in one LATA could be captured by aggregating traffic in two or more

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[9] BellSouth has also suggested that it sees no significant operational barrier to facilitating Aggregated Transport, although it has yet to commit to actually offering to permit this option or even provide a timetable under which Aggregated Transport would become available in Verizon territory.

LATAs. Under this latter model, a BSP would connect to the ILEC at a single point and serve any customer in that ILEC's region, presumably at a price that would compete with the first phase of Aggregated Transport described above. Naturally, BSPs like DIRECTV Broadband would support this kind of change only if it were clear that the economic benefits of such greater efficiencies would accrue to BSPs, consumers and ILECs alike, and that the ILECs had addressed other inequities described in these comments.

Even in light of recent positive developments outlined above, it remains the case that ILECs operate with a natural conflict between favoring their affiliated BSPs and, alternatively, providing a neutral, stable, and efficient platform over which BSPs will drive broadband demand by providing competitive innovative broadband services. Unfortunately, we believe that, if the Commission adopts some of the possible approaches set forth in this *NPRM,* it will encourage the ILECs to revert to conduct and policies that will drive independent BSPs out of the provision of wireline broadband Internet services.

Until recently, independent BSPs have found it increasingly difficult to compete with the ILECs in the provision of broadband services, and in certain cases, have been forced to cease providing such services altogether. Much of this anti-competitive behavior may have been in open violation of the ONA, network disclosure and other requirements of the *Computer III* rules. DIRECTV Broadband urges the Commission to consider relaxation of ILEC oversight only where the ILECs first demonstrate concrete steps toward a neutral, stable, and efficient platform for the delivery of wireline broadband services.

E. Current Attempts by SBC at "De-Tuning" Broadband by Revising Tariffs without Review or Opportunity for Comment Foreshadow ILEC Strategy Without Title II Safeguards

The Commission has on recent occasions granted requests by "SBC-ASI" for special permission to implement changes to the terms and conditions for wholesale broadband access services on one day's notice and without cost support or the opportunity for comment by parties affected by these changes. This trend is extremely worrisome and may foreshadow developments in ILEC broadband pricing should the Commission permit the removal of Title II safeguards for such services.

In September 2001, SBC-ASI belatedly filed a tariff to reestablish tariffing of DSL service six months after the decision of the United States Court of Appeals for the District of Columbia Circuit in *Ascent* determined that SBC-ASI was an ILEC for regulatory purposes.[10] By means of special permission, the Commission then permitted SBC-ASI to establish substantial changes to the terms and conditions under which wholesale customers were receiving service on a detariffed basis, including a 10% - 15% rate increase, without cost support or any opportunity to request suspension or investigation of these rate increases.

Since then, SBC-ASI has requested, and obtained, several other special permissions to file substantive tariff revisions on one day's notice and again without cost support. On February 25, 2002, SBC-ASI requested, and the Commission granted, a request for special permission to implement substantive rate and other changes.[11] Among other changes, this tariff is an attempt

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[10] *Association of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001)("*Ascent*").

[11] SBC Advanced Solutions, Inc., 2nd Amended Application No. 6, Request for Special Permission (February 25, 2002).

to establish a basis for SBC-ASI to eliminate the "always on" nature of DSL in Ameritech territory by requiring the use of PPPoE.[12] As noted above, permitting this to occur will preclude provision of a host of beneficial competitive services, such as Voice over IP services, by SBC-ASI's wholesale customers. Most worrisome is the fact that the architectural change to the DSL product was made in this manner after DIRECTV Broadband had voiced its objection to PPPoE in direct discussions with SBC-ASI. The commission should also note that the one-day approval process was utilized to insert language for the now-infamous BCG proposals, under which SBC would be entitled to deliver other DSl-based services to the BSP's customer over the same line without BSP permission or compensation, and to use CPNI supplied by the BSP to market these services.[13]

Although BSP customers of SBC SBC-ASI may file a complaint under Section 208 of the Act once the tariff is in effect, key changes degrading the nature of the service offering, including price increases, speed reductions, and other fundamental changes to the relationship between the ILEC and BSPs would cause immediate harm and disruption to BSPs and their customers. Changes of this nature made without opportunity for review and comment cannot be adequately remedied in the complaint process.

A distressing feature of SBC-ASI's requests for special permission has been the failure to adequately explain the proposed changes, particularly where these changes appear to merely

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[12] ASI Tariff FCC No. 1, Sections 6.2.10, 7.2.10.

[13] Since September, SBC has eliminated the BCG requirements and during recent reconsiderations of issues independent BSPs consider most harmful, SBC has suggested it may agree it will not implement BCG or similar requirements.

degrade the service offering. Thus, SBC-ASI did not explain or justify adopting an architecture that might eliminate the "always on" feature of DSL in the Ameritech region and which forced BSPs to engineer manual procedures and new software in order to deploy broadband services in the Ameritech region.

SBC-ASI's insistence that it may file all its tariff revisions on one day's notice and without cost support is, in effect, a demand that it be treated as non-dominant before the Commission has made that determination. While there was never any basis for making that determination, the fact that the changes increased prices, lowered speeds, attempted to interfere with BSP customers, and forced BSPs to re-engineer their retail services provides ample grounds for the Commission to be cautious about considering the removal of key Title II obligations for broadband access to the Internet over wireline facilities. The fact that SBC and other ILECs have expanded their share of DSL services while raising prices[14] when costs are declining,[15] must, at a minimum, call into question the appropriateness of considering the removal of established Commission safeguards against abusive practices. Particularly where, as in this instance, there is absolutely no evidence that an ILEC faces any competition in provision of

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[14] A July 2001 study published by the School of Information Management and Systems at the University of California at Berkeley found that the RBOCs control 90% of the wholesale residential DSL market nationwide. *New York Times*, August 6, 2001, at C1 "*Bell Companies Blamed for D.S.L.'s Woes*."

[15] SBC has boasted of a 25% decline in DSL subscriber acquisition costs since late 2000 and predicts further expense reductions due to declining equipment costs and operational efficiencies SBC Investor Briefing, "Second-Quarter Diluted Earnings Per Share Increases by 8.9% with Focus on Disciplined Financial Management, Growth Drivers (July 25, 2001) at 5 ("SBC continues to improve the economics of DSL. Acquisition costs have declined by more than 25 percent since the fourth quarter of 2000 due to modem cost reductions and operational improvements." http://www.sbc.com/Investor/Financial/Earning_Info/docs/2Q_IB_FINAL_Color.pdf (viewed March 1, 2002).

wholesale DSL service[16] used to provision broadband Internet access, the Commission risks substantial harm to competition by pursuing premature treatment of such ILEC services as though they were non-dominant.

III. FACILITIES-BASED WIRELINE BROADBAND INTERNET ACCESS SERVICE IS A BUNDLED OFFERING OF INFORMATION AND TELECOMMUNICATIONS

A. Wireline Broadband Internet Access is In Part the Provision of Separate Transparent Transmission Service

DIRECTV believes that the Commission erred in the *NPRM* when it stated that it seems as if a provider offering the broadband wireline Internet access service over its *own* facilities does not offer "telecommunications" to anyone, it merely uses telecommunications to provide end users with wireline broadband Internet access service.[17] Rather, facilities-based wireline broadband Internet access is a bundled offering of a telecommunications service *and* information services, with the particular mixture of telecommunications (transmission) and information services determined by the business plan of a particular provider. The diversity of business plans and service offerings currently available from facilities-based broadband Internet access providers should not distract the Commission from the unalterable fact that transmission – the provision of transparent high-speed transmission to the consumer from the home to the Internet – is a necessary, distinct, and clearly common-carriage component of this bundle. The persistence of this distinct transmission element is not impaired by the use consumers make of it – such as whether the facilities-based provider of broadband Internet services uses transmission to provide

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16 *See also infra* at p.42.

17 *NPRM* at ¶ 25.

its content to the customer, or whether, at any given moment the provider merely is providing telecommunications (a transparent transmission path from the consumer to third-party content located on the Internet).

In fact, particularly with web surfing, most of the time the customer of Internet access service is using, and the provider provides, nothing more than a transparent transmission path. While the users in many applications have the capability to change the appearance and format of content they receive or send, these capabilities are *not* provided by the broadband Internet provider, but by software resident on the end user's computer and/or the information content provider to which the end user chooses to connect. Thus, in Web access, changes in the appearance of information on the user's screen are controlled and determined by either the end user or the content provider. Moreover, the IP protocol starts on the end user's computer and is transmitted unchanged by the BSP. The user also controls the points on the Internet to which he is connected. Thus, Internet access service involves no more than provision of a transparent transmission path over a pure form of common carriage.

Even where the user is utilizing the transmission path provided by the wireline broadband Internet access provider to connect to content providers (whether that same entity offering access or a third party), this does not render the transmission component an information service. The traditional telephone network has always provided users the ability to retrieve information. Users are able to use the voice network to connect to numerous sources of stored information such as banking information, stock quotes, news, entertainment information, horoscope, weather, and time of day. Likewise, the most traditional information services provided over the voice network – directory assistance and operator services – are normally offered by the telephone

company (the transmission provider) without such add-on "information" services altering the basic nature of the common carriage offering.

Further, there is a charge associated with provision of the pure transmission path (irrespective of whether any information service offerings bundled with it are utilized) which is part of the total charge for wireline broadband Internet access. Therefore, the Commission may, and should, conclude that the self-provisioned transmission function of wireline broadband Internet access is a telecommunications service when provided to, and used by, the end user.

Certainly, there are instances where the wireline broadband Internet provider is using the pure transmission path to provide information services functions, rather than providing telecommunications. Thus, when the user connects to stored information provided by the BSP, such as the end user's personal web page or stored email, telecommunications are being used merely to provide an information service.

Therefore, on the face of it, wireline broadband Internet access is a bundled offering of telecommunications and information service, because sometimes the wireline provider is providing no more than telecommunications and at other times it is using telecommunications to provide an information service.

B. Wireline Broadband Internet Access Cannot be Categorized as a Unitary Inextricably Intertwined Service

The Commission has recognized that merely combining an enhanced service with a basic service offering for a single price does not always constitute a single enhanced service offering. In determining whether the offering is a single information service or a bundled offering of information service and telecommunications service for one price, the "issue is whether, functionally, the consumer is receiving two separate and distinct

services."[18] The answer to this question is, in the context of wireline broadband Internet access service, an unambiguous "yes." While previously the Commission has concluded that Internet access should be classified as a single information service because it offers end users information service capabilities inextricably intertwined with data transport,[19] the present *NPRM* presents such conclusion only tentatively. Moreover, the *NPRM's* unitary conception of wireline broadband Internet access service offering fails to support this tentative conclusion. By statutory definition, telecommunications is functionally different from add-ons that could constitute an information service, such as changes in the form and content of information. Therefore, when providers are providing no more than a pure transmission service they are offering something that *is* functionally distinct from the information services that are provided at different times and only when selected by the user.

It is possible that the "functionally separate" test previously enunciated by the Commission is intended to be resolved at least in part by reference to customer perception. Yet here too it would seem obvious that customers know when they are receiving a pure transmission path and when the provider is manipulating the content. In fact, consumers demand and expect that when they use the Internet to access a given website that the BSP will not change the form or content of the information provided by

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[18] *Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge, Fourth Order on Reconsideration*, CC Docket Nos. 96-45, 92-262, 94-1, 91-213, 95-72, FCC 97-420, 13 FCC Rcd. 5318, 5474-75, ¶ 282 (1997).

[19] *Id.* ¶. 80.

the third party web site. Therefore, they correctly perceive that provision of access to websites is provision of a pure transmission path. Accordingly, under the "functionally separate" test wireline broadband Internet access is the provision of *both,* a telecommunications service, and an information service.

A meaningful application of the functionally separate test should be supported by an empirical examination of functionalities and customer perceptions. However, the present *NPRM* provides no such empirical or factual analysis or studies that could support the conclusion that the transmission component of wireline broadband Internet access service is functionally "inextricably" intertwined with information service functions, most of the latter of which are in any event provided by the user's software or third party content providers. Therefore, the *NPRM* does not provide a basis for concluding that facilities-based wireline broadband Internet access is a unitary information service offering. Rather, the transmission component of wireline broadband Internet access service should be classified as a telecommunications service.

C. The Transmission Element Needs to Be Classified As A Telecommunications Service in Light of Technological and Industry Trends

The Commission, irrespective of any particular conclusions it arrives at as a result of the present inquiry, needs to assure that the regulatory classifications it chooses will produce analytically sound and technologically neutral bases for regulation. Conceptualizing broadband Internet access as a unitary service fails this most basic test by potentially lumping all-but circuit-switched telephony into an ill-defined category termed "information service." Particularly in view of technological and industry developments that not too far in the future would see packet-switched TCP/IP-based

services replace the circuit-switched networks, the Commission steps onto a slippery slope capable of swallowing telecommunications. Simply put, it is apparent to most observers that the legacy circuit-switched network will soon be replaced by an application-independent digital packet IP protocol[20] network. In fact, a number of CLECs and other carriers are already doing so, which enables them to provide more service for less than what ILECs charge.[21] In this environment, all services, including voice, will become merely software-defined applications traveling over the same digital packetized transmission services. In the IP environment, there will be no meaningful distinction between the network and the Internet. Rather, the Internet will be the network. In short, this ill-considered extension of the "contamination doctrine," treating all facilities-based uses of Internet access service as (apparently by virtue of contamination of being offered as a bundle with information services) a unitary seamless information service is untenable, since the "Internet access" exception may be expected to in short order swallow up the whole of telecommunications. Instead, the Commission should classify uses of packetized digital networks that do not change the form or content of the transmission as telecommunications service.

In its previous analyses and application of the statutory definitions of telecommunications and information services, and before that, of the definitions of enhanced and basic services, the

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[20] The Local Exchange Network in 2015, Lawrence K. Vanston, Ph.D., Technology Futures, Inc. 2001.

[21] *See* Comments of Association of Local Telecommunications Services, *et al*, CC Docket No. 01-338, filed April 5, 2002, p. 14.

Commission resolved issues in light of policy goals and objectives. The Commission established its definitions of basic and enhanced services in order to assure that information services providers would not be unnecessarily regulated as common carriers while assuring that ILECs are not able to leverage control of the local network into control of the provision of information services.

As explained above, wireline broadband Internet access consists in part of a telecommunications service when the facilities-based provider provides a pure transmission path to the Internet. To the extent the Commission perceives any doubt on this issue, however, it should resolve the statutory classification issues raised in this proceeding in light of the serious policy issues and consequences of some of the possible outcomes of this proceeding.

As widely reported in the press and elsewhere, one apparent possible outcome of this proceeding is that ILEC broadband capability would be deregulated by defining it as an information service, and removing it from Title II oversight. At the same time, the Commission might eliminate *Computer Inquiry* unbundling obligations and other safeguards against discrimination.

It is hard to imagine a more alarming prospect to independent BSPs. Removal of safeguards against discrimination would permit ILECs to further extend their dominance in wireline broadband Internet access beyond the 93% of customers they already possess in some regions. Removal or weakening of safeguards against discrimination would remove the foundation for the growth and success of the Internet. Nor would these deregulatory steps promote broadband deployment. Together, they present an overwhelming case that the Commission should promptly determine that it will continue to define ILECs' participation in

broadband as one of common carriage subject to existing, or strengthened, Title II safeguards against discrimination.

IV. THE TRANSMISSION COMPONENT OF FACILITIES-BASED WIRELINE BROADBAND INTERNET ACCESS SERVICE IS, AND SHOULD REMAIN, SUBJECT TO TITLE II

A. The Transmission Component Has Always Been Subject to Title II

The possibility apparently envisioned in the *NPRM* that the transmission component of wireline broadband Internet access service could be subject only to Title I is erroneous, if for no other reason than because it is already subject to Title II. While the *NPRM* purports to determine the appropriate framework for wireline broadband Internet access service, the Commission already has such a framework in place pursuant to which LECs may and are offering broadband Internet access over their own facilities. Thus, under long standing *Computer II* rules adopted pursuant to the Commission's authority under Title II

> carriers that own common carrier transmission facilities and provide enhanced services must unbundle basic from enhanced services and offer transmission capacity to other enhanced service providers under the same tariffed terms and conditions under which they provide such services to their own enhanced service operations.[22]

In short, the Commission has already asserted Title II authority over the transmission component of wireline broadband Internet access.

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[22] *Frame Relay Order*, 10 FCC Rcd. at 13719.

B. The Telecommunications Component of Wireline Broadband Internet Access Service is Subject to Title II Under *NARUC I* and *II*.

Apart from the fact that the transmission component of wireline broadband Internet access service is already subject to Title II, the traditional test for common carriage also requires that it be, and remain, subject to common carrier regulation.

The Act defines a common carrier as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio . . . ."[23] The Commission's regulations define common carrier as "[any] person engaged in rendering communications service for hire to the public."[24] The U.S. Court of Appeals for the D.C. Circuit in *NARUC I* and *II*[25] found these rules less than fully illuminative and established a test for determining whether an activity constitutes communications common carriage. The D.C. Circuit deemed that the "critical point" is the "quasi-public character of the activity involved," *i.e.*, "that the carrier undertakes to carry for all people indifferently."[26] The key is not how large a clientele the carrier serves, but the "holding oneself out to serve the public indiscriminately."[27] This quasi-public character will either arise out of a legal compulsion to serve the public indifferently or reasons implicit in the nature of the operations to expect an indifferent holding out to the eligible user public.[28]

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[23] 47 U.S.C. § 153(10).

[24] 47 C.F.R. § 21.2.

[25] *National Association of Regulatory Utility Commissioners v. Federal Communications Commission*, 525 F.2d 630 (D.C. Cir. 1976) ("*NARUC I*"); *National Association of Regulatory Utility Commissioners v. Federal Communications Commission*, 533 F.2d 601 (D.C. Cir. 1976) ("*NARUC II*").

[26] *NARUC I* at 641.

[27] *Id.* at 642.

[28] *Id.*

Common carrier service is contrasted to private carriage which is "set aside for the use of particular customers, so as to not be generally available to the public."[29] Private carriage is characterized by a "clientele that might remain relatively stable, with terminations and new clients, the exception rather than the rule."[30] The carrier would desire and expect to negotiate with and select future clients on an individualized basis.[31]

The Court in *NARUC II* added a second prong to the test for common carriage, *i.e.* that customers "transmit intelligence of their own design or choosing."[32] The key consideration is whether the content of the transmission may be under the customer's control. This "control" can be as simple as the decision whether to transmit information or not.[33] Post-*NARUC I* and *II,* the Supreme Court adopted a definition of communications common carrier that adopted the D.C. Circuit's approach. The Supreme Court defined a communications common carrier as a carrier "that makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing."[34]

Applying these principles to the transmission component of facilities-based wireline broadband Internet access service leads to the inescapable conclusion that it is a common carrier offering subject to Title II, which, as noted, is already the case in any event. The legal

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29 *Id.*

30 *Id.* at 643.

31 *Id.*

32 *NARUC II* at 609.

33 *Id.* at 610.

compulsion-to-serve part of the *NARUC I* test is met by current regulatory requirement that LECs may provide information services, including Internet access, as customers of their own tariffed offering of the transmission service.

Moreover, even if the *Computer III* legal compulsion to provide the underlying transmission service on a common carrier basis did not exist, the offering of the underlying transmission service meets the test for common carriage because LECs are offering to provide the telecommunications portion of the service indiscriminately to the public at large. Thus, ILECs do not deal on an individual basis with millions of consumers. Instead, they undertake to provide service to all on the same terms and conditions. Indeed, it is the only way ILECs could provide mass services. As discussed previously, the transmission component of self-provisioned wireline broadband Internet access is a separate offering to provide a pure transmission path for access to content on the Internet, and users expect and use it as such, even though they may also choose at times to receive more functions from the provider in which case the providers uses the telecommunications component to provide an information service. Therefore, the transmission component of facilities-based wireline broadband Internet access is a common carrier offering under *NARUC I.*

It is important to note that the D.C. Circuit in *NARUC I* limited the Commision's discretion to apply, or not apply, common carrier status. The Court held:

> Further, we reject those parts of the Orders which imply an unfettered discretion in the Commission to confer or not confer

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[34] *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979).

> common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve. The common law definition of common carrier is sufficiently definite as not to admit of agency discretion in the classification of operating communications entities. A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so. Thus, we affirm the Commission's classification not because it has any significant discretion in determining who is a common carrier, but because we find nothing in the record or the common carrier definition to cast doubt on its conclusions that SMRS are not common carriers.[35]

Thus, the Commission may not, for example, refrain from applying Title II based on the misguided view that this would promote deployment of broadband.[36] Rather, the transmission component of wireline broadband Internet access is fully subject to regulation as common carriage under *NARUC I.*

C. ILECs' Dominance in the Provision of Wireline Broadband Requires Application of Title II

While dominant carrier status is not a precondition for application of Title II, it nonetheless fully justifies assertion of Title II jurisdiction. Based on the record established in the *Non-Dom Proceeding*,[37] the Commission will conclude that the ILECs are dominant providers of wireline broadband. This dominance is attributable to the fact that only ILECs possess the ubiquitous loops and transport facilities necessary to reach consumers and businesses. This gives

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[35] *NARUC I.* at 644.

[36] The Court did intimate, however, that while the Commission has little discretion in defining what should be a common carrier service as a non-common carrier service it may have some discretion to refuse to exercise its common carrier regulatory powers. *NARUC II* at 620. Thus, as discussed elsewhere in these comments insofar as the Commission chooses to deregulate ILEC provision of broadband, it may do so under Title II.

[37] *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, CC Docket No. 01-337, FCC 01-360 (released December 20, 2001) ("*ILEC Broadband NPRM*").

them the ability, absent regulatory safeguards, to leverage control of these essential facilities into control of the information services marketplace, as the Commission has long recognized. Thus, absent regulation, ILECs can engage in systematic discrimination against BSPs, and, as discussed herein, are doing so even under current safeguards.

The Commission in its proceeding addressing the proper regulatory treatment of ILEC broadband services has recognized that ILECs continue to be dominant with respect to basic local exchange service and that wireline broadband services are provided over the same local exchange and exchange access facilities.[38] Thus, ILECs' demonstrated ability to provide a broadband capability stems in part from their ability to piggy-back the construction of broadband facilities upon the core voice telephone network.[39] This gives the ILECs a significant economic advantage of integration that is unavailable to competing, non-integrated providers. Inevitably, they will be able to leverage this integration in a manner that effectively excludes competing information service providers from provision of wireline broadband Internet services, and they are doing so today. As economists Robert Hall and William Lehr argue:

> But the on-ramps to the information highway remain in the hands of the monopolists. The last mile of the telecom network lacks the competition that has invigorated the rest of the network. The last mile remains in the hands of the traditional phone companies, the Bells. Bell control of the last mile means that continuing regulation is essential. Because homeowners and small businesses rarely have ways to gain access to the telecom network apart from

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[38] *ILEC Broadband NPRM* at ¶ 6. As Chairman Powell notes in his separate statement (at page 1) the ILECs remain "clearly dominant" in local exchange service.

[39] For instance, Project Pronto, which SBC is using to spur deployment of broadband services, is an overlay of the existing SBC voice network meaning it will not displace existing network facilities.

> the Bells' last mile connections, the Bells could extract full monopoly value of the network if they were not regulated. As competitive service providers add value to telecom products, the Bells would absorb that value through higher prices for the last mile, and consumers would be denied the benefit of added value.[40]

If ILECs are freed from their common carrier obligations that require them to provide service on demand,[41] at tariffed rates that are just and reasonable,[42] without unreasonable discrimination,[43] and if ILECs are freed from their interconnection and unbundling obligations in regard to facilities used to provide information services,[44] then the ILECs will be able to disadvantage competitors that rely on their facilities, which is their objective. Accordingly, until solutions like Aggregated Transport become the norm in relationships between the ILECs and unaffiliated BSPs, the Commission must recognize the ILECs' dominance in the provision of wireline broadband, which fully justifies the continuation of Title II authority over the transmission capability of facilities-based wireline broadband Internet access.

D. The "Contamination Doctrine" Does Not Apply to Facilities-Based Providers

In keeping with Commission precedent, and for the reasons outlined above, the so-called "contamination doctrine" does not apply to facilities-based carriers, particularly to dominant carriers. The Commission when formulating its *Computer II* and *III* rules has previously rejected the application of the contamination doctrine to facilities-based dominant carriers such as the

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[40] Robert E. Hall and William H. Lehr, *Promoting Broadband Investment and Avoiding Monopoly,* at 3 (Feb. 21, 2002).

[41] 47 U.S.C. § 201(a).

[42] 47 U.S.C. § 203; § 201(b).

[43] 47 U.S.C. § 202.

[44] 47 U.S.C. §§ 251, 252.

ILECs irrespective of the combination of basic and enhanced services provided. Under a contamination theory, when a common carrier transmission service is combined with an information service and provided to an end user as a single information service, the information service "contaminates" the communication service and removes it from common carrier regulation.[45] Thus, under this logic, a combination of basic and enhanced service could be treated in its entirety as the latter, an unregulated enhanced service.[46] The Commission already recognized that, if it applied this doctrine to all facilities-based carriers indiscriminately, at some point conventional exchange service also would become unregulated because it would be contaminated with the enhanced service of protocol conversion.[47] The Commission noted that this would be an "improper policy result if exchange service remains, as it is now, a near monopoly otherwise warranting regulation."[48] The Commission noted that applying the contamination doctrine to non-dominant carriers that did not have underlying facilities, and purchased transmission capacity from other parties via tariff would be sensible since no policy goal is served by regulating any aspect of these entities' offerings.[49] For dominant carriers, however, the Commission noted:

> Conversely, the offerings of dominant carriers are often monopoly or near-monopoly ones. Such offerings are needed and used by competitors and can be manipulated anticompetitively. Ensuring

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[45] GN Docket No. 00-185, Reply Comments of EarthLink, Inc. at 31 (Jan. 10. 2001), *citing*, *Frame Relay Order*, 10 FCC Rcd. at 13719.

[46] CC Docket No. 85-229, Proposed Rules, Third Computer Inquiry, 50 FR 33581, ¶ 32 (1985)

[47] *Id.*

[48] *Id.*

[49] *Id.* at ¶ 46, n. 34.

> that such offerings continue to be made subject to the common carrier duties of reasonableness and avoidance of unreasonable discrimination serves important policy goals. We propose below to develop policies that apply such a dominant/non-dominant entity split.[50]

Since ILECs remain dominant in provision of wireline broadband services and competitors remain virtually exclusively reliant on ILECs for transmission capacity, the Commission should continue to reject the application of the contamination doctrine to ILECs and continue to separately regulate the transmission component of Internet access service that ILECs provide over their own facilities.

On its website, SBC states that it is working on enabling access for consumers to an "integrated package of broadband access, premium data and Internet services and telephony."[51] Under the contamination doctrine, the telephony aspect would escape regulation because it would be bundled with the information service offerings. SBC also notes that it will "Network your PCs and Internet devices using existing telephone wires - no new wiring required."[52] To avoid prematurely deregulating ILECs, the Commission should, therefore, continue to decline to apply the contamination doctrine to facilities-based ILECs.

E. The Availability of Title II Unbundled Transport for Internet Access Has Proven Successful and Should be Maintained

As discussed herein, the *Computer II* regulatory framework was designed to promote and achieve a deregulated information services marketplace. That framework has succeeded in

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50 *Id.*

51 *See* http://www.sbc.com/data_capabilities/0,5931,1,00.html

52 http://www.swbell.com/content/0,3854,7,00.html

spectacular fashion so that the Internet and the associated increase in demand for telecommunications services has been a key growth factor for the United States economy and made the United States the world leader in telecommunications technology. However, this growth and success would not have occurred if safeguards, including the *Computer II* unbundling obligations, had not been in place to assure that ILECs could not leverage their control of the local network into control of the information services marketplace. In short, the Commission's assertion of Title II authority and imposition of appropriate safeguards has strongly served the public interest and should remain in place.

V. THE PUBLIC INTEREST REQUIRES CONTINUED TITLE II REGULATION OF THE TRANSMISSION COMPONENT OF WIRELINE BROADBAND INTERNET ACCESS

A. National Security, Privacy, and Consumer Protection Statutes Require the Continued Regulatory Treatment of the Internet Access Transmission Component as a Telecommunications Service

The Commission seeks comment on how its tentative conclusion that broadband Internet access service is an information service with a telecommunications component would affect obligations of telecommunications service providers concerning national security, network reliability, and consumer protection.[53] As outlined in the following, the Commission's tentative conclusion would thwart achievement of important national security, network reliability, and consumer protection goals.

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[53] *See NPRM*, at ¶ 54.

1. CALEA

CALEA requires that all telecommunications carriers' equipment, facilities, or services that provide a customer or subscriber with the ability to originate, terminate, or direct communications be capable of meeting specific law enforcement assistance capability requirements.[54] CALEA defines telecommunications carriers as "person[s] or entit[ies] engaged in the transmission or switching of wire or electronic communications as a common carrier for hire."[55] The definition of telecommunications carrier under CALEA excludes "persons or entities insofar as they are engaged in providing information services. . . ."[56] The Commission has determined that where facilities are used solely to provide an information service, whether offered by an exclusive information service provider or by a common carrier that has established a dedicated information system apart from its telecommunications systems, such facilities are not subject to CALEA.[57] If the Commission were to determine that the provision of broadband Internet access service is an "information service" as opposed to a telecommunications service, CALEA would not apply to the provision of such service by telecommunications service providers. It is not realistic to expect that ILECs will build separate Internet access facilities. Nonetheless, categorizing broadband Internet access as an information service to this extent threatens to undermine CALEA and will undoubtedly complicate CALEA compliance.

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54 *See generally*, 47 U.S.C. § 1001 *et seq.*

55 47 U.S.C. § 1001(8).

56 *See* 47 U.S.C. §1002(b)(2)(A).

57 *See Communications Assistance for Law Enforcement Act*, Further Notice of Proposed Rule Making, 13 FCC Rcd. 22632 (1998), at ¶ 68.

Moreover, it is highly unlikely that Congress intended the broadband capability of the telephone network to be categorically excluded from CALEA. Therefore, the Commission should determine that wireline broadband Internet access is in part a telecommunications service in order to assure that the goals of CALEA are met and that law enforcement agencies have the necessary law enforcement tools as the public switched network evolves towards a more advanced broadband capability.

2. Network Reliability and Interconnectivity

Section 256 of the Act provides that the Commission "shall establish procedures for . . . oversight of coordinated network planning by telecommunications carriers and other *providers of telecommunications services* for the effective and efficient interconnection of public telecommunications networks used to *provide telecommunications services*."[58] In enacting Section 256, Congress intended to preserve interconnectivity of the public telecommunications network. However, the Commission's authority to oversee and coordinate network planning is limited in section 256 to telecommunications carriers and other providers of telecommunications services.[59] Therefore, if the Commission were to determine that broadband Internet access services are information services, the Commission would not be able to coordinate network planning and interconnectivity with respect to these services. Congress could not have intended for Section 256 to only apply to provision of narrowband telephone service. Accordingly, the

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[58] 47 U.S.C. Sec. 256 (b) (emphasis added).

[59] *See* 47 U.S.C. § 256(b).

Commission should classify the transmission component of wireline broadband Internet access in order to permit the Commission to oversee broadband interconnectivity as Congress intended.

3. Discontinuance of Service

Section 214 of the Communications Act limits the ability of telecommunications carriers to unilaterally discontinue telecommunications service. If the Commission were to determine that facilities-based wireline broadband Internet access is exclusively an information service, providers would be able to discontinue service without regard to section 214. While the Commission notes that discontinuance applications are routinely granted,[60] the Commission's rules contain important consumer protection requirements requiring customer notice and allowing users to appeal to the Commission if the discontinuance will cause unanticipated harm to their business or the customers they serve. Moreover, as is well known, the Commission has recently started heightened oversight of discontinuance applications.[61] The increasing importance of broadband Internet connectivity to consumers and businesses, and the evolution of the network toward integration with the Internet, mandates that the Commission maintains its regulatory oversight over the transmission component of wireline broadband Internet access service. Accordingly, the Commission should determine that the telecommunications component of broadband Internet access service is an offering of telecommunications service subject to Title

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[60] *See NPRM*, at ¶ 57, n.99.

[61] *Reminder to Common Carriers Regarding Discontinuance of Domestic Service Under Section 214 of the Communications Act*, Public Notice, DA 01-1173, released May 8, 2001; *Requirements For Carriers to Obtain Authority Before Discontinuing Service in Emergencies*, Public Notice, DA 01-1257, released May 22, 2001.

II obligations in order to assure that discontinuances of service do not unduly harm the public interest.

4. Customer Proprietary Network Information

In order to safeguard consumer's privacy, the Act limits telecommunications carriers' dissemination of customer proprietary network information ("CPNI") derived from the provision of telecommunications services.[62] Thus, section 222(c)(1) specifies that the privacy protection requirements of that section apply to CPNI gained by a carrier "by virtue of its provision of a telecommunications service ..."[63] Therefore, if the Commission classifies wireline broadband Internet access service exclusively as an information service, CPNI gained by virtue of provision of wireline broadband Internet access will not be subject to the protections of Section 222. Congress could not have intended this result because under the current regulatory framework ILECs provide Internet access service as customers of their own tariffed telecommunications services and thus are subject to Section 222 with respect to the information services they provide using those tariffed services. Accordingly, the Commission should classify the provision of wireline broadband Internet access services as in part a telecommunications service in order to protect Consumers' privacy rights as intended by Section 222.

5. Access by Persons with Disabilities

Classifying wireline broadband Internet access as an information service would also eliminate the protections contained in the Act aimed at ensuring that telecommunications

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62 *See* 47 U.S.C. § 222(a).

63 *See* 47 U.S.C. § 222(a) (emphasis added).

services are accessible and usable by persons with disabilities. Section 255 of the Act provides that " *a provider of telecommunications service* shall ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable."[64] Classifying wireline broadband Internet access service as exclusively an information service would therefore exclude persons with disabilities from section 255 protections for wireline broadband Internet access services. Again, classifying wireline broadband Internet access services as an information service threatens to undermine yet another key consumer protection provision. Congress could not have intended this result. Therefore, the Commission should define wireline broadband Internet access as being comprised in part of an Internet access service in order to preserve access by persons with disabilities to the Internet.

B. State Authority Could be Adversely Impacted

In the *NPRM*, the Commission seeks comment on how classification of wireline broadband Internet access services as exclusively an information service would impact the balance of federal and state responsibilities over the network, particularly in light of the fact that the Commission has found that xDSL transmission used to provide Internet access services are subject to Commission jurisdiction.[65]

Under the Act, states exercise authority over intrastate telecommunications service, which they regulate as common carriage. The Act provides that "nothing in this Act shall be construed to apply or give the Commission jurisdiction with respect to (1) charges, classifications, practices

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[64] 47 U.S.C. § 255 (c) (emphasis added).

[65] *See NPRM*, at ¶ 62.

services, facilities, or regulations for or in connection with intrastate communication service . . ."[66] A pronouncement by the Commission that ILEC broadband capability is, in fact, not subject to common carrier regulation because it is used exclusively to provide an information service could have profound impacts on the ability of states to regulate wireline broadband services.

The states have concurrent jurisdiction over the provision of xDSL services used to provide Internet access services. In order to displace state regulation, congressional intent must be "clear and manifest."[67] Similarly, federal preemption of state regulation "must be clear and occurs only in limited circumstances."[68] Under Section 2(b) of the Act Congress left the states with substantial authority so long as state regulation does not conflict with the Commission's authority over interstate communications. Therefore, the Commission should define wireline broadband Internet access service as a telecommunications service to preserve state authority over ILEC intrastate wireline broadband services.

VI. TITLE II PROVIDES THE BEST BASIS FOR FULL AND FAIR INTERMODAL COMPETITION

ILECs are attempting to persuade the Commission that they must be relieved of all obligations to permit access by intramodal competitors to the broadband capability of their networks because of intermodal competition from cable operators. Thus, preceding the *NPRM,*

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[66] 47 U.S.C. § 152(2)(b).

[67] *See Jones v. Rath Packing*, 430 U.S. 519, 525 (1977).

[68] *See Communications Systems Int'l v. the Cal. Pub. Utils. Comm'n*, 196 F.3d 1011, 1017 (9th Cir. 1999).

ILECs urged the Commission to define their broadband network capability as subject only to Title I and will undoubtedly do so in this proceeding.[69]

The Commission should reject this argument because ILECs are fully able to compete intermodally as common carriers subject to Title II. Under the current regulatory regime, ILECs are able to provide Internet access service and other information services, including video programming, as customers of their own common carrier services. Thus, they are not precluded from competing under current rules. In fact, ILECs have been spectacularly successful in rolling out DSL service. ILECs provide 93% of intramodal broadband Internet access and nearly half of intermodal broadband Internet access.[70] These facts by themselves refute ILEC claims that they are hindered by Title II regulation in competing. Even under current safeguards, ILEC policies continue to disadvantage BSP competitors, as discussed in these comments. These policies explain why ILECs have been successful in capturing 93% of the provision of intramodal broadband Internet access service.

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[69] *See*, Letter from William P. Barr, Verizon, to Michael K. Powell, Chairman, Federal Communications Commission (Jan. 9, 2002), cited at fn. 61, *NPRM*.

[70] ILECs dominance in the wireline broadband market is shown by the fact that out of the 2.7 million high-speed DSL lines, about 93% of these lines were reported by incumbent local exchange carriers (ILECs); about 86% of these lines were reported by the Regional Bell Operating Companies (RBOCs); and about 7% of these lines were reported by non-ILECs. ILEC DSL customer growth rates are now fast outstripping CLEC customer growth rates.

VII. TITLE II PROVIDES THE BEST BASIS TO ESTABLISH DEREGULATION WHILE MAINTAINING APPROPRIATE SAFEGUARDS

A. The Commission May Not Have Adequate Authority Under Title I To Establish Adequate Safeguards for ILEC Participation in Provision of Broadband Information Services

The Commission seeks comment on the possibility of applying a "minimal regulatory Title I regime" to wireline broadband Internet access services and the implications this would have on nondiscriminatory access objectives.[71] For the reasons stated in these comments, the Commission should retain Title II jurisdiction over the transmission component of wireline broadband Internet access service.

The Commission should at this point seriously question whether it would have sufficient authority under Title I to fashion adequate safeguards were it to decide to treat this transmission component as outside of Title II common carriage. Title I identifies the various subject matters over which the Commission may exercise authority pursuant to other Titles in the Act. The Commission has stated:

> Section 1 of the Communications Act established the Commission '[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States ... adequate facilities at reasonable charges ....' Similarly, Section 2 gives us jurisdiction over 'all interstate and foreign communication by wire or radio' and 'all persons engaged within the United States in such communication ...' Finally, Section 3 defines 'communication by wire' and 'communication by radio' as including 'the transmission ... of writing, signs, signals, pictures and sounds of all kinds ... including all instrumentalities, facilities, apparatus, and services

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71 *NPRM* at ¶¶ 16, 50.

> (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.'[72]

However, identification of this subject matter is not an independent source of authority. As the Ninth Circuit has held:

> Title I is not an independent source of regulatory authority; rather, it confers on the FCC only such power as is ancillary to the Commission's specific statutory responsibilities. [citation omitted] In the case of enhanced services, the specific responsibility to which the Commission's Title I authority is ancillary to its Title II authority is over common carrier services.

Obviously, ancillary authority under Title I does not provide the same degree of authority as direct authority under Title II. Moreover, for the Commission to exercise Title I jurisdiction over facilities-based Internet access service it would need to be ancillary to its Title II jurisdiction over common carrier services. If, however, the Commission finds no common carrier component to wireline broadband Internet access service, it may undercut the basis of its ancillary jurisdiction. Therefore, it is not clear on its face to what extent the Commission could exercise any affirmative authority over wireline broadband Internet access under Title I.

Further, the Commission has not heretofore established a comprehensive scheme of regulation under Title I. Thus, the Commission has not chosen heretofore to impose any regulation of information services under Title I. ILECs are currently free to discriminate in provision of services subject only to Title I such as billing and collection services[73] and voice

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[72] *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations By Time Warner Inc. and America Online Inc., Transferors, to AOL Time Warner, Inc., Transferee*, CS Docket No. 00-30, Memorandum Opinion and Order, FCC 01-12, ¶ 148 (2001).

[73] *Detariffing of Billing and Collection Services*, 102 FCC 2d 1150 (1986).

mail service. In fact, the Commission's affirmative exercise of Title I jurisdiction has mainly been limited to preempting state regulation. For instance, when the Commission detariffed ILEC provisioning of inside wiring, it also used its Title I jurisdiction to preempt states from tariffing the service.[74] Likewise in *Computer III*, the Commission attempted to preempt nearly all state regulation of enhanced services.

As noted above, the Commission describes Title I as a "minimal . . . regulatory regime." The Commission has recognized the limitations of its Title I jurisdiction by noting in regard to ILEC validation and screening services for calling cards that "regulation of these services under Title I ancillary jurisdiction, as suggested by some of the LECs, might not be adequate to ensure provision of these services on a non-discriminatory basis, under just, reasonable and non-discriminatory terms and conditions."[75] Accordingly, the Commission opted for Title II regulation of those services.[76]

For these reasons, DIRECTV Broadband questions whether the Commission could fashion under Title I the adequate safeguards it may be contemplating. The Commission asks that if it requires access to ILEC transmission services for Internet access how such access

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[74] *Promotion of Competitive Networks In Local Telecommunications Markets*, WT Docket No. 99-217, CC Docket No. 96-98, Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217 and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98, ¶ 56 (1999).

[75] *Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, CC Docket No. 91-115, Report and Order and Request for Supplemental Comment, FCC 92-168, ¶ 25 (1992).

[76] *Id.*

should be priced.[77] There is nothing in the Commission's current Title I precedent that would support adoption of pricing standards under Title I.

Accordingly, the Commission should retain Title II regulation over the transmission component of wireline broadband Internet access service in order to be assured that it will have adequate authority to maintain necessary safeguards against discrimination.

B. "Private Carriage" Also Does Not Provide An Adequate Basis for Regulation

The Commission also seeks comment on possible regulation of facilities-based wireline broadband Internet access as private carriage or by oversight of contracts. This is inappropriate and unsuitable because wireline broadband Internet access service does not in fact constitute private carriage. As noted, ILECs offer service to end users and to the hundreds of ISPs in their regions on a public offering basis, and this is the only practical way for them to do so. ILECs do not determine with each customer on an individual basis on what terms to provide service, nor would they even if completely deregulated. Therefore, it is self-evident that the notion of "private carriage" regulation is ill considered and that the Commission must reject this approach to regulation of wireline broadband Internet access.

Nor would an effort to regulate individual contracts be feasible. As noted, ILECs are not able to offer service on an individualized basis to millions of consumers or hundreds of ISPs. Moreover, and in declared contrast to the Commission's aims to streamline procedures and eliminate cumbersome regulations, the contract approach would also be cumbersome for both the Commission and all parties, even if ILECs were likely to use individual contracts. Under the

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[77] *NPRM* at ¶ 50.

Sierra Mobile doctrine, an agency may modify a private contract that may "cast upon other consumers an excessive burden," but such modification can only follow investigation and a determination that the contract was unjust, unreasonable, unduly discriminatory or preferential.[78] Thus, unlike under Section 204(a) where the Commission can suspend a tariff and investigate, the private contract would continue in force until the Commission concluded its investigation. It is apparent that such an approach is insufficient to deter discrimination and in fact would compound enforcement problems already apparent even with current safeguards in place.

Moreover, the Commission may only modify the contract, when the contract's terms "adversely affect the public interest."[79] As the Commission has noted:

> The threshold for demonstrating sufficient harm to the public interest to warrant contract reformation under the Sierra-Mobile doctrine is much higher than the threshold for demonstrating unreasonable conduct under sections 201(b) and 202(a) of the Act. Thus, a carrier cannot obtain the remedy of contract reformation by showing only that the contract requires it to pay an unduly high price for communications services. Such private economic harm, standing alone, lacks the substantial and clear detriment to the public interest required by the Sierra-Mobile doctrine.[80]

Accordingly, a private carriage or contract approach to regulation of the transmission component of wireline broadband Internet access service would be unsatisfactory because it

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[78] *See FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956). The doctrine has been applied to the FCC. *See Bell Tel. Co. of Pa. V. FCC*, 503 F.2d 1250, 1275-1282 (3d Cir. 1974).

[79] *IDB Mobile Communications, Inc. v. Comsat Corporation*, File No. E-97-48, Memorandum Opinion and Order, FCC 01-173, ¶ 15 (2001).

[80] *Id.*

would impose undue burdens on regulators and, in any event, provides insufficient assurance of reasonable terms and conditions of service.

C. The Commission Has the Ability to Deregulate Under Title II

While Title II provides adequate authority for safeguards, it is also permits deregulation where appropriate. Title II sets forth a full spectrum of powers and authority for the Commission, but there is nothing that requires the Commission to apply the full scope of its authority under Title II. Thus, "non-dominant" carriers are subject to Title II but subject only to minimal specific requirements, while "dominant" carriers appropriately remain subject to more extensive oversight.[81] To name only one specific example of deregulation under Title II, the Commission has allowed television licensees to broadcast electronic newspapers, data, computer software, and paging services transmitted in the interstices of television bands without being subject to traditional Title II requirements even though it deemed such services to be common carrier services.[82] Section 160 of the Act has given the Commission even more flexibility by allowing it to forbear from applying provisions of the Communications Act, save for interconnection and Section 271 provisions, if certain conditions are met.[83] Therefore, the Commission has ample flexibility under Title II to respond to business conditions. There is no need to apply Title I regulation in order to do so.

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[81] *Federal Telecommunications Law* at § 3.11. This is not to say that the solution is to classify the ILECs as non-dominant in the provision of broadband services. The record in CC Docket No. 01-337 establishes that such a reclassification is not warranted at this time. When conditions in the marketplace change such that ILECs are "non-dominant" then the Commission can adjust Title II obligations as warranted.

[82] *Amendment of Parts 2, 73 and 76 of the Commission's Rules to Authorize the Offering of Data Transmission Services on the Vertical Blanking Interval by TV Stations,* Report and Order, 101 F.C.C.2d 973, ¶¶ 13-21 (1984).

VIII. THE COMMISSION SHOULD RETAIN *COMPUTER III* SAFEGUARDS INCLUDING THE REQUIREMENT THAT LECS OFFER SEPARATELY THE TRANSMISSION COMPONENT OF WIRELINE BROADBAND INTERNET ACCESS SERVICE

A. *Computer Inquiry* Safeguards Are NOT Obsolete In a Broadband Environment

In the *NPRM*, the Commission seeks comment on whether the *Computer Inquiry* requirements should be modified or eliminated for facilities-based wireline broadband Internet access services.[84] The Commission suggests that these requirements may not apply to wireline broadband Internet access services because the restrictions imposed in the *Computer Inquiry* proceedings were initiated "at a time when very different legal, technological and business circumstances presented themselves to the Commission" and addressed services "more akin to voice mail and other narrowband applications," rather than broadband services.[85] Contrary to the Commission's suggestion, however, the safeguards established in the *Computer Inquiry* proceedings are equally applicable to, and necessary for, wireline broadband Internet access services.

In fact, the ongoing evolution in broadband technology and services delivered over the publicly funded telecommunications infrastructure[86] makes the *Computer III* safeguards even

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[83] 47 U.S.C. § 160.

[84] *NPRM* at ¶ 43.

[85] *Id.* at ¶¶ 31, 35.

[86] The fact that the public telephone system and its supporting infrastructure reaches almost every home and business in the nation is primarily the result of over 70 years of public funding of its expansion through Universal Service fees. This makes the public telephone system a unique public/private resource. The unmatched extent of the system represents its most attractive feature to those who plan to leverage the system as the foundation

more relevant today than ever before. The information services market has evolved tremendously since the creation of the basic/enhanced services dichotomy, but as is evident in the Commission's *Computer Inquiry* proceedings, the *Computer Inquiry* safeguards were designed to accommodate new and emerging technologies, including broadband services. Moreover, the legal, business, and technological factors underlying the fundamental principles of the *Computer Inquiry* proceedings, upon which the safeguards are based, are equally valid today in the provision of wireline broadband services. Thus, at a minimum, the existing *Computer Inquiry* safeguards must remain in place for future, more advanced, wireline broadband information services.

In its *NPRM*, the Commission suggests that because the technological characteristics of wireline broadband Internet access services did not exist at the time of the initial *Computer Inquiry* proceedings, the policies and requirements implemented in those proceedings may not apply to wireline broadband Internet access services. Rather, the Commission indicates that such safeguards should be limited to narrowband technologies.[87] While it is true that there have been tremendous technological advances associated with the provision of enhanced services, the Commission recognized and took into consideration future technological advances for both basic

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for delivering future, even faster, wireline broadband connectivity, for instance by using the system's core infrastructure and rights-of-way to deliver fiber to the curb.

[87] *NPRM* at 36-37.

and enhanced services when it established its basic and enhanced regulatory regime and corresponding safeguards.[88]

The Commission's initiation of the *Computer Inquiry* proceedings arose from the realization that the traditional telephone network was no longer limited to providing plain old telephone services and that technological evolution allowed the provision of computer and data processing (enhanced) services over these networks.[89] The Commission's *Computer Inquiry* proceedings focused on the degree of regulation that should apply to enhanced services and the basic services used to transmit them. The result was the creation of a basic/enhanced services dichotomy, in which the Commission separated the basic common carrier transmission services

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[88] *See In Re Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, Final Decision and Order,* 28 F.C.C.2d, 268-69 (1971) *("Computer I")* (finding that data processing will be a major force in the economy "in both absolute and relative terms in the years ahead"); *see also See Amendment of Section 64.702 of the Commission's Rules and Regulations, Final Decision,* 77 F.C.C.2d 384, 425 (1980) ("Computer II")(where the Commission refused to classify different categories of enhanced services because in "a market as vibrant as enhanced services" such a distinction "may miss important new developments").

[89] *See In Re Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities*, 7 F.C.C.2d 11 (1966) ("*Computer I NOI*").

from the rapidly evolving enhanced services,[90] finding separate regulatory schemes for these services necessary to address the functional and competitive differences between them.[91]

The Commission's establishment of the basic/enhanced dichotomy evolved from advances in microprocessor technology that permitted data to be processed outside of a central location and at intermediate locations or even within customer premises equipment ("CPE").[92] "Distributed processing," as it is known, refers to a network of computers in which data processing is frequently initiated on local computers and then sent over the network. and is the fundamental basis for the establishment of the basic transmission service classification in *Computer II.* In that proceeding, the Commission made it clear that its basic service classification was not meant to restrict "a carrier's ability to take advantage of advances in technology in designing its telecommunications network."[93] The Commission recognized that basic service can be offered utilizing different bandwidths, as well as different analog and digital

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[90] The Commission defined basic service as "the common carrier offering of transmission capacity for the movement of information," including, analog or digital transport of voice, data and video. *Id.* at 419. The Commission held that basic services provide "pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer-supplied information." *Id.* at 420. The Commission defined "enhanced service" as a service that "combines basic service with computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information." *Id.* at 387; *see also* 47 C.F.R. § 64.702(a). Following the passage of the 1996 Act, the Commission found that Congress intended to maintain the basic/enhanced distinction in its definitions of "telecommunications services" and "information services" and that "enhanced services" and "information services" were synonymous. *See Federal State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd 111501, 11516-17, 11520, 11524 (1998).

[91] *Computer II,* 77 F.C.C.2d 384.

[92] *Computer II* at 391-93.

[93] *Id.* at 420.

capabilities.[94] The Commission also stated that "[u]se internal to the carrier's facility of communications techniques, bandwidth compression techniques, circuit switching, message or packet switching, error control techniques, etc. *that facilitate economical, reliable movement of information does not alter the nature of the basic services.*"[95] Thus, the Commission's establishment of the basic services classification and associated regulation took into account the future technological potential of such services. Indeed "distributed processing" directly foreshadowed the Internet.

The Commission also took into consideration the potential evolution of enhanced services. Indeed, the rapid evolution of enhanced services technology served as a key factor in the Commission's establishment of the basic/enhanced services dichotomy.[96] Finding that the provision of enhanced services was effectively competitive and seeking to promote and foster this competition, the Commission held that enhanced services should not to be subject to Title II common carrier regulation.[97] The Commission found that such services would "flourish best" in a competitive market and would provide the public with "a wider range of existing and new data processing services."[98] The Commission found that its decision in *Computer I* to forgo regulation of data processing was "largely accurate" and "[i]f anything, it was overly conservative as to the extent to which market applications of computer processing technology

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94 *Id.* at 419.

95 *Id.* at 420.

96 *See Computer II*, 77 F.C.C.2d at 433.

97 *Id.* at 423-33.

98 *Id.* at 433.

would evolve."[99] The Commission confirmed its finding that "regulation of enhanced communications services would limit the kinds of services an unregulated vendor could offer, restricting this fast-moving, competitive market."[100] The Commission also noted that "the pressure on a set of administrative rules which fail to recognize the growth in operational sophistication demanded by our nation's economy will be inexorable."[101] Thus, it is clear that when the Commission established the basic/enhanced services distinction consideration of future technologies and services was a key component to its analysis.

Moreover, the key *Computer Inquiry* safeguards, such as the unbundled offering of basic service, are not technology-specific. They can, and do currently, apply equally to narrowband and broadband wireline services. There is nothing in the key *Computer III* safeguards of framework that suggests they were intended only for the narrowband network.

Accordingly, the policies and safeguards established in the basic/enhanced services regulatory regime also apply to future technologies and services. Throughout the history of the *Computer Inquiry* proceedings, the primary purpose of this dichotomy and the need for the safeguards has been to address the reliance of the enhanced services on basic transmission services.[102] The Commission found that "enhanced services are dependent upon the common carrier offering of basic services and that a basic service is the 'building block' upon which

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99 *Id.*

100 *Id.* at 434.

101 *Id.* at 422.

102 *Computer I*, 28 F.C.C. at 269; *see also Computer II*, 77 F.C.C.2d 384; and *Amendment of Section 64.702 of the Commission's Rules and Regulations, Report and Order*, 104 F.C.C.2d 958 (1986) ("*Computer III Phase I Order*").

enhanced services are offered."[103] The Commission consistently has determined that dominant facilities-based carriers providing both basic and enhanced services have an incentive to discriminate against competing enhanced service providers that seek to purchase the underlying transmission capacity from the dominant carriers.[104] Thus, to protect the competitive nature of enhanced services, the Commission retained Title II common carrier regulation of the basic transmission services used to provide these services.[105]

Based on these fundamental principles, the Commission has placed restrictions on facilities-based carriers providing both basic and enhanced services. Specifically, the Commission requires carriers that "own common carrier transmission facilities and provide enhanced services [to] unbundle basic from enhanced services and offer transmission capacity to other enhanced service providers under the same tariffed terms and conditions under which they provide such services to their own enhanced service operations."[106] The Commission also has imposed additional safeguards on the ILECs, including the Comparably Efficient Interconnection

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103 *Id.*

104 *See In Re Policy and Rules Concerning the Interstate, Interexchange Marketplace, Report and Order*, 16 FCC Rcd. 7418, 7420 (2001)("*CPE/Enhanced Services Unbundling Order*").

105 *Id.* at 428.

106 *CPE/Enhanced Services Unbundling Order*, 16 FCC Rcd. at 7421 (citing *Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling and American Telephone and Telegraph Company Petition for Declaratory Ruling, Memorandum Opinion and Order*, 10 FCC Rcd. 13717, 13719 (1995) ("*Frame Relay Order*"); and *Competition in the Interstate Interexchange Marketplace*, CC docket No. 90-132, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd. 4562, 4580 (1995).

(CEI), Open Network Architecture (ONA), cost allocation and network disclosure requirements.[107]

Changes in technology may have improved transmission speeds and allowed the transfer and use of more sophisticated data and broadband services -- and this evolution will continue. Even so, wireline broadband providers still rely on basic transmission services interconnected with the telecommunications network to provide these broadband services. Indeed, the Commission has continued to apply the *Computer Inquiry* safeguards to new technologies, including high-speed, packet-switching services.[108] As the Commission found in its *Frame Relay Order*, treating the high-speed, packet-switching frame relay service as a basic service "provides competitive access to the underlying basic service of facilities-based carriers who are often better able to implement new communications technologies. This access allows competing enhanced service providers to more easily enter and compete in the market for such technologies."[109] Although during the course of the Commission's *Computer Inquiry* proceedings the Commission has modified the level of restrictions governing the provision of basic and enhanced services,[110] it has not eliminated the requirement that the basic transmission

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[107] Finding that the section 251(c)(5) network disclosure rules of the 1996 Act were as comprehensive, if not more so, than the *Computer III* disclosure rules, the Commission eliminated the latter rules. *Computer III Further Remand Order*, 14 FCC Rcd. at 4316-17. The BOCs also are subject to the Commission's cost-accounting rules to prevent cross-subsidization between the regulated transmission services and the unregulated enhanced services. See 47 C.F.R. Parts 31, 43, 67 and 69.

[108] *See Frame Relay Order*, 10 FCC Rcd. 13,717.

[109] *Id.* at 13722.

[110] In its *Computer II* proceeding, the Commission required the dominant Bell Operating Companies to establish a separate subsidiary for the provision of enhanced services, which was required to purchase its transmission capacity from the parent company's tariff. *Computer II*, 77 F.C.C.2d 384. In its *Computer III*

component be separated from the enhanced service. In addition, after over 30 years of addressing this issue, and even more significantly, post-1996 Act, in a decision released only a year ago, the Commission found that the underlying transmission service used to provide information services is still a critical input for enhanced service providers,[111] and currently is applying these safeguards to the ILECs' provision of wireline broadband services.[112]

The Commission's own *Computer Inquiry* policies recognize that technological distinctions in services are irrelevant to basic/enhanced services regulation if dominant control over the facilities essential to provide these services still exists. As discussed herein,[113] the ILECs still are dominant in the local exchange market and still control essential facilities used to provide wireline broadband services. Thus, the fundamental principles of dominant control over transmission facilities and the potential for discrimination that served as the basis for the establishment of the *Computer Inquiry* policies and safeguards[114]still apply today and require that these anti-discrimination safeguards remain in place for wireline broadband access services.

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proceeding, the Commission eliminated the separate subsidiary requirement and replaced it with non-structural safeguards including the Comparably Efficient Interconnection (CEI) and Open Network Architecture (ONA) requirements. *Computer III, Phase I Order*, 104 F.C.C.2d 958. Currently the BOC are permitted to provide bundled basic and enhanced services, but only subject to the restrictions and safeguards associated with providing these services, including non-discriminatory access to the underlying transmission services.

111 *Id.* So much so, that the Commission imposes the same separation requirements on non-dominant carriers. *Id.* at 7442-43.

112 *CPE/Enhanced Services Unbundling Order*, 16 FCC Rcd. at 7425.

113 *Supra* at p. 28.

114 *See Computer II*, 77 F.C.C.2d at 422 (noting that as "the market applications of computer technology increase, communications capacity has become the necessary link allowing the technology to function more efficiently and more productively").

The *NPRM* also cites the pro-competitive and deregulatory policies of the 1996 Act that are aimed at the development of the Internet and deployment of advanced services, suggesting that the statutory mandates may be different than those considered in the *Computer Inquiry* proceedings.[115] Contrary to the Commission's suggestion, however, the statutory mandate underlying the *Computer Inquiry* policies is consistent with the statutory mandate governing wireline broadband access services. As the basis for its *Computer Inquiry* rules, the Commission cites to its mandate pursuant to section 151 of the Act "to make available 'to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communications service with adequate facilities at reasonable charges . . . .'"[116] In its *NPRM*, the Commission cites to the statutory mandate of section 706 to encourage "'the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . .'" as the basis for its regulation of wireline broadband access services.[117] As is evident in the language of both of these provisions, the Commission's goal under both statutory provisions is similar -- to establish rules and policies that will make communications and advanced telecommunications available to all Americans. Thus, it follows that the Commission's pro-competitive policies governing enhanced services in the *Computer Inquiry* proceedings are consistent with the pro-competitive policies set forth in the 1996 Act. Indeed, nearly 30 years ago, the Commission found the enhanced services market truly competitive, stating that "regulation of enhanced communications services would limit the kinds of services an unregulated vendor could offer, restricting this fast-moving,

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115 *NPRM* ¶. 35, n. 69.

116 *Computer I*, 28 F.C.C.2d at 268 (citing 47 U.S.C. § 151).

competitive market."[118] At the same time, however, the Commission recognized that the transmission component underlying the provision of enhanced services was owned and controlled by dominant carriers seeking to compete directly with the enhanced service providers—a critical factor that had the potential to threaten this competitive market.[119] As is evident herein, this same concern exists in the wireline broadband access services market today, and thus, the same policies must apply.

Throughout the current history of the *Computer Inquiry* proceedings, the Commission has adapted its regulations to the changes in the enhanced services market and modified its restrictions and safeguards, accordingly. But, the Commission has always found, even as recently as a year ago, that the continued dominance of the ILECs in the provision of wireline broadband Internet access warrants the retention of the *Computer Inquiry* safeguards.[120] The status of wireline market conditions for broadband Internet access services has not changed so dramatically in the last year to justify such a radical departure in the Commission's regulations aimed at protecting ISPs from discrimination. It is significant to note, in assessing the impact of the pro-competitive requirements of the 1996 Act on the *Computer Inquiry* safeguards the Commission stated that "[a]lthough many ISPs compete against one another, each ISP must obtain the underlying basic services from the incumbent local exchange carrier, often still a ILEC, to reach its customers. Although . . . under the 1996 Act, the ILECs are subject to

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117 *NPRM* at n.69 (citing 47 U.S.C. § 157).

118 *Computer II*, 77 F.C.C.2d at 433-34.

119 *Id.* at 475.

additional statutory requirements, such as the section 251 unbundling and the network information disclosure requirements . . . we cannot yet conclude that the pro-competitive goals of the 1996 Act have been fully reached."[121]

In sum, there is nothing about wireline broadband Internet access services and other services that rely upon high-speed connectivity across the last mile of the public telephone infrastructure that justifies exempting these services from the fundamental principles governing common carrier regulation and protection against discrimination and anticompetitive behavior that lay at the heart of the *Computer Inquiry* policies and safeguards. Indeed, as demonstrated herein, these principles are critical to promoting competition in the wireline broadband access market. Information service providers must compete with dominant ILECs in the provision of Internet access and other broadband services delivered over wireline facilities. The ILECs still are dominant carriers in the local exchange and exchange access markets and have an incentive to discriminate against competitors to their affiliated BSPs in the provision of wireline broadband access services. Non-facilities-based ISPs still rely on the ILECs for the transmission capacity used to transmit their broadband access services to their customers and this transmission capacity remains the critical input for the provision of these services. Thus, there is no legal, regulatory, or market distinction that supports the elimination of the *Computer Inquiry* safeguards with respect to broadband access services.

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120 *CPE/Enhanced Services Unbundling Order*, 16 FCC Rcd at 7425.

121 *See In Re Computer III Further Remand Proceedings*, 14 FCC Rcd. 4289, 4301 (1999) ("*Computer III Further Remand*") (refusing to remove the safeguards established to protect ISPs from discriminatory treatment).

B. Sections 201 and 202 Ensure That Access to Underlying Transmission Capacity for Information Services is Provided Under Just and Reasonable Rates and on a Non-Discriminatory Basis

If the transmission component of wireline broadband Internet access service is not regulated as telecommunications service under Title II of the Act, providers of broadband access services will lose the critical protections of sections 201 and 202. As the Commission notes in its *NPRM*, ISPs currently purchase the transmission needed for their wireline broadband services from tariffs.[122] The terms and conditions of these tariffed services are governed by the just and reasonable and non-discriminatory mandates of sections 201 and 202 of the Act. If the provision of transport services necessary to provide broadband access services are no longer subject to these Title II requirements, then dominant carriers that provide competing broadband access services, while also controlling the underlying transmission capacity, will be free to discriminate against their broadband access competitors. This would change if the ILECs progress further down the path toward a point of enlightened self-interest where they would provide a faster service at better prices and under more favorable standards in order to induce BSPs to purchase more DSL connectivity (and thus serve more consumers). The fact that we are able to include a favorable trend in these comments should not be treated lightly by the Commission, nor should it be treated a sufficient basis to eliminate key safeguards and incentives that actually support the trend. If the Commission is able to identify relief from unnecessary regulatory burdens which, if removed, would lead to demonstrable efficiencies that will be passed along to ILEC channel

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[122] *NPRM* at ¶. 50.

partners (independent BSPs and others), then the Commission may have identified the best place to consider reforms.

Section 201(b) requires that the rates, terms, and conditions of providing such wireline services be just and reasonable.[123] In addition, Section 202(a) of the Act, makes it unlawful for any common carrier to impose unjust or unreasonable discrimination for rates, terms, conditions, facilities or services in connection with like communication services.[124] Sections 201(b) and 202 were cited by the Commission in its *Computer Inquiry* proceedings as primary safeguards for ensuring that ISPs obtain transmission services on nondiscriminatory terms and conditions. Specifically, the Commission emphasized that all carriers, including dominant and non-dominant, carriers have a "firm obligation under section 202 of the Act to not discriminate in their provision of transmission service to competitive Internet or other enhanced service providers."[125] The Commission also noted that section 201(b) prohibits discrimination in rates, terms or conditions that would favor the carrier itself, over a competing enhanced service provider.[126] In citing these statutory safeguards, the Commission sought to reassure ISPs that they would have non-discriminatory access to the transmission services they needed to provide their information services.[127] If the underlying transport for wireline broadband Internet access services is not regulated as a Title II common carrier service, these protections against

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123 47 U.S.C. § 201(b).

124 47 U.S.C. § 202(a).

125 *CPE/Enhanced Services Unbundling Order* at ¶. 46.

126 *Id.*

127 *Id.*

discrimination will cease to be applicable. As explained above, the concerns underlying the Commission's findings in the *Computer Inquiry* proceedings have not changed and are equally valid today. Accordingly, it is essential that the underlying transmission component of broadband access services be classified as telecommunications services and be subject to Title II common carrier regulation.

C. Experience has Shown that Current Performance Standards and Section 271 Compliance Are Not Adequate Substitutes for *Computer Inquiry* Safeguards

In its *NPRM*, the Commission seeks comment on whether the assessment of certain performance standards on the ILECs' provision of narrowband services would be sufficient to forgo the imposition of the *Computer Inquiry* safeguards on the ILECs' provision of wireline broadband services.[128] The Commission also seeks comment on whether Section 271 compliance for entry into the long distance market would be an adequate substitute for the *Computer Inquiry* safeguards in the ILECs' provision of wireline broadband services.[129] As DIRECTV Broadband has sought to demonstrate in the foregoing, neither the imposition of performance standards, nor compliance with the section 271 requirements is a sufficient substitute for the *Computer Inquiry* safeguards, which are necessary to protect ISPs against discrimination by the ILECs in the provision of wireline broadband access services.

The Commission's suggestion that the *Computer Inquiry* requirements may be unnecessary for the ILECs' wireline broadband services if the ILECs are achieving certain

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128 *NPRM* at ¶. 48.

129 *Id.*

performance levels with respect to its narrowband services, starts with the erroneous presumption that there should, or could, be disparate regulatory treatment for ILECs' narrowband andbroadband wireline services. As explained herein,[130] there is no legal, technical or market-related distinction that would warrant the elimination of the *Computer Inquiry* safeguards with respect to the ILECs' provision of wireline broadband Internet access services. Moreover, assessing the ILECs' performance levels in the delivery of non-broadband services is irrelevant to whether the safeguards are necessary to protect broadband ISPs from discrimination with respect to the ILECs' delivery of competing wireline broadband services over essential facilities. Simply because a ILEC is meeting minimum performance standards in its provision of narrowband services does not mean that the ILEC is not engaging in systematic discrimination against ISPs in provision of broadband services. This is especially true if there are no safeguards in place to protect competing broadband providers against discrimination from ILECs that control facilities used to provide competing wireline broadband services. However, new and strengthened broadband performance standards could usefully supplement existing *Computer III* safeguards, and the Commission should consider adopting them.

Section 271 requirements also are not an adequate substitute for *Computer Inquiry* safeguards because they do not address the specific concerns underlying the need for the safeguards. They are also only applicable to ILECs that choose to provide long distance service. Moreover, the Section 271 14-point competitive checklist focuses on interconnection and access

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130 *Supra* at pp. 54-60.

to the ILEC's network facilities, including access to UNEs and unbundled local loop by CLECs. Thus, Section 271 requirements fail to ensure that ISPs will be granted non-discriminatory access to the basic transmission services necessary to provide their wireline broadband services.[131] In particular, Section 271 does not specifically require the ILECs providing bundled basic and information services to separate the basic transmission services underlying the provision of wireline broadband services and to make this transmission service available to competing broadband service providers. Applying the *Computer Inquiry* safeguards to broadband Internet access services, however, would help to ensure such non-discriminatory access.

Moreover, even with respect to CLECs, under Section 271 the ILECs need only meet a minimum level of performance and that performance is assessed on the "totality of the circumstances."[132] Such an assessment provides no guarantee that a ILEC has met the required performance level with respect to all competitive carriers seeking access to its network facilities or even with respect to each element on the 14-point checklist. Moreover, there is no guarantee that an ILEC will maintain those performance levels after an ILEC's section 271 application is approved. Indeed, Verizon paid $3.5 million in Performance Assurance Plan penalties for December 2000 and $3.8 million for January 2001 for failure to meet post-review performance

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[131] As noted above, *supra* p. 59, in a recent *Computer Inquiry* decision, the Commission found that notwithstanding the additional regulatory protections put in place by the 1996 Act, the *Computer Inquiry* safeguards were still necessary to protect enhanced service providers from discrimination.

[132] *See In Re Joint Application of SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Long Distance for the Provision of In-Region, InterLATA Services in Kansas and Oklahoma,* 16 FCC Rcd. 6237, ¶29 (2001).

standards.[133] Thus, ILEC compliance with the section 271 requirements is an inadequate substitute for the *Computer Inquiry* safeguards.

D. Intermodal Competition Is Not Relevant to the Need for ILEC Safeguards

In the *NPRM*, the Commission states that the "core assumption underlying the *Computer Inquiries* was that the telephone network is the primary, if not exclusive, means through which ISPs can obtain access to customers."[134] The Commission suggests that the *Computer Inquiry* safeguards may no longer be necessary to protect ISPs from discrimination because there are other network platforms, such as cable, wireless and satellite, over which customers can access broadband services.[135] Contrary to the Commission's suggestion, however, intermodal competition, such as it is, does not obviate the need for *Computer Inquiry* safeguards.

While *end-user customers* may have access to a variety of different platforms for receiving broadband services, including cable modem service, *information service providers* do not have ready access to such platforms for the provision of their services to their customers. First, cable companies are regulated under Title VI, not Title II of the Act, and thus are not required to open their underlying transmission facilities to BSPs insofar as they are providing cable service. Indeed, with respect to cable modem services, the Commission recently found that cable modem service does not include an offering of telecommunications services to the

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[133] *See* Verizon New York PAP/CCAP Market Adjustment summary, December 2000 and January 2001. http://238.11.40.241/east/wholesale/resources/res_ny_perf_assur_plan_results.htm

[134] *NPRM* at ¶ 36.

[135] *Id.*

public.[136] The Commission also found that the *Computer II* requirements governing the unbundling of transmission facilities do not apply to cable operators providing cable modem services, and even if they did, the Commission waived the requirements of the Commission's own initiative.[137] Even though a few cable operators are providing transmission services to unaffiliated ISPs by choice[138] or pursuant to a government decree,[139] this access is extremely limited and only available to a few BSPs. Moreover, differences between their respective customer bases render cable modem services, which focuses primarily on residential customers, an inadequate substitute for ISPs targeting business customers.

E. *Computer Inquiry* Safeguards Should Be Preserved and Expanded

At a minimum, for the reasons stated above, the Commission should continue to apply the existing *Computer Inquiry* safeguards to the ILECs with respect to their provision of wireline broadband Internet access services.[140] However, as documented in comments filed in the Commission's *Computer III Further Remand FNPRM* , and incorporated by the NPRM into this proceeding, the ILECs have engaged in damaging anti-competitive and discriminatory behavior

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136 *See In Re Inquiry Concerning High-Speed access to the Internet over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking,* GN Docket No. 00-185, FCC 02-77 at ¶¶. 45-47, 95 (rel. Mar. 15, 2002).

137 *Id.* at ¶¶ 43-45.

138 *See* Comcast Corp, *Comcast and United Online to Offer NetZero and Juno High-Speed Internet Service* (press release), Feb. 26, 2002).

139 *See* FTC AOL Time Warner Merger Order, Federal Trade Commission, Docket No. C-3989, File No. 001 0105, §§ II, III (December 14, 2000).

140 *Id.*

in the wireline broadband services market despite the existing safeguards.[141] Accordingly, the Commission should strengthen existing safeguards.

As suggested by commenters in response to the Commission's *Computer III Further Remand FNPRM*, the Commission should consider modifying existing safeguards and/or imposing additional requirements on the ILECs in the provision of broadband Internet access services. Some suggested changes may include the following:[142]

- Require complete structural separation between ILEC wholesale and retail operations;
- Make all agreements between the ILECs and their ISPs available to the public;
- Impose reporting requirements to monitor ILEC compliance, including performance metrics regarding installation intervals;
- Enforce existing joint marketing safeguards and implement additional safeguards for ensuring equitable marketing opportunities; and,
- Require non-discriminatory access to ILEC ordering and billing systems.
- Immediately end *de facto* suspension of review and comment procedures for changes to ILEC DSL tariffs.

ILECs have not demonstrated that they can consistently eliminate their inclination to discriminate in favor of their affiliated BSPs and engage in anti-competitive behavior in the provision of broadband access services. Until the Commission observes and ongoing patterns of self-policing that would, for instance, permanently suppress the institutional sentiment that gave

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[141] *See* Initial Comments of the California ISP Association, Inc., CC Docket Nos. 95-20 and 98-10 (filed April 16, 2001).

rise to the BCG requirement, it remains essential that the Commission maintain the existing *Computer Inquiry* safeguards. The Commission should also consider modifying or establishing additional safeguards to protect competitors from anti-competitive behavior and to ensure that competing ISPs have access to essential transmission facilities and services on non-discriminatory terms and conditions. The Commission should only consider refining regulatory limitations where the ILECs have already eliminated inequities and where the change is certain to result in improvements that will benefit consumers.

IX. DEREGULATION OF ILEC WIRELINE BROADBAND INTERNET ACCESS SERVICE WOULD NOT PROMOTE THE AVAILABILITY OF WIRELINE BROADBAND SERVICES

A. ILECs Are Already Deploying a Broadband Capability

ILECs have already widely deployed a broadband capability, and are rapidly installing an even more robust broadband capability in their existing networks. For example, the following facts, most of which come from the ILECs themselves, show that they are increasing the deployment of a broadband capability notwithstanding Title II and other regulatory obligations:

- BellSouth announced 25% growth in data revenues and a 189% increase in DSL subscribers in 2001, which BellSouth noted was "the fastest growth of any DSL or cable provider in the country."[143]

- BellSouth claimed that it had "the most aggressive DSL deployment strategy in the industry" and that it had increased its DSL coverage from 45% to 70% of households in 2001. [144]

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142 *Id.* at 30-35.

143 BellSouth investor news, "BellSouth Reports Fourth Quarter Earnings," http://www.bellsouth.com/investor/pdf/4q01p_news.pdf (Jan. 22, 2002).

- In its fourth quarter, year-end 2001 results report, Qwest stated that "DSL, wireless and Internet services continue to be key growth products."[145]

- Qwest's DSL customers at the end of 2001 represented a 74% increase from the end of 2000.[146]

- In a January 24, 2002, "Investor Briefing" SBC announced that it had expanded its DSL-capable footprint by 37% in 2001 and that it had the "industry's largest DSL Internet customer base."[147]

- SBC announced growth in its data services of between 14.4% and 27.9% in 2001 and 16.9% in the fourth quarter of 2001 for high-speed data transport services.[148]

- Verizon reported a 122% increase in DSL subscribers and a 21.2% increase in data transport revenues in 2001.[149]

- By year-end 2001, Qwest had increased by 15% over year-end 2000 the number of its central offices equipped for DSL.[150]

- In 1999, SBC launched "Project Pronto," a $5 billion investment in high-speed wireline broadband services to residential consumers.[151]

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[144] Newsroom, "BellSouth Captures 620,500 DSL Customers and Deploys Broadband Capabilities to More than 15.5 Million Lines," http://bellsouthcorp.com/proactive/newsroom/release (Jan. 3, 2002).

[145] "Qwest Communications Reports Fourth Quarter, Year-End 2001 Results," http://media.corporate-ir.net/media_files/NYS/q/q_1_28_02earnrel.htm (Jan. 29, 2002).

[146] *Id.*

[147] SBC Investor Briefing No. 228, http://www.sbc.com/investor_relations/financial_and_growth_profile /investor_briefings /1,5869,253,00.html, at 2 and 5 (Jan. 24, 2002) ("SBC Fourth Quarter Briefing").

[148] SBC Second Quarter Briefing, at 4; SBC Third Quarter Briefing, at 4; SBC Fourth Quarter Briefing, at 4.

[149] "Verizon Communications Reports Solid Results For Fourth Quarter, Provides Outlook for 2002," http://investor.verizon.com/news/VZ/2002-01-31_X263602.html (Jan. 31, 2002).

[150] "Qwest Communications Reports Fourth Quarter, Year-End 2001 Results," http://media.corporate-ir.net/media_files/NYS/q/q_1_28_02earnrel.htm (Jan. 29, 2002).

[151] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Third Report, CC Docket No. 98-146, FCC 02-33, ¶ 70 (rel. Feb. 6, 2002) ("*Third Section 706 Report*").

- SBC also continued expansion of its broadband network capabilities, with 25 million DSL-capable customer locations at year's end. In 2001, SBC's DSL-capable footprint expanded by more than 6.7 million customer locations, or 37 percent.[152]

- In June 2001, Verizon informed the New York Public Service Commission that the "unprecedented and unpredictable demand" for high-speed data circuits required increased capital spending and the deployment of new technologies.[153]

- Verizon also announced that it had deployed DSL to central offices serving 79% of Verizon's local access lines and that its total number of data circuits in service had increased 53% from 2000.[154]

Obviously, these ILECs have deployed, and are continuing to deploy, broadband facilities, including fiber in the loop. This deployment is occurring in spite of the Commission's determination that DSL and other wireline broadband services are telecommunications services subject to common carrier regulation[155] and that advanced ILEC wireline networks are fully subject to Section 251(c)(3) unbundling obligations.[156] Therefore, regardless of selected pronouncements from ILECs' regulatory spokespersons, the ILECs actions reveal that regulatory obligations have not inhibited their investment in broadband infrastructure and deployment of wireline broadband services.

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[152] SBC-Investor Relations-Investor Briefings, "Revenue and Expense trends," http://www.sbc.com/investor_relations/financial_and_growth_profile/investor_briefings (March 20, 2002).

[153] *See*, Opinion and Order Modifying Special Services Guidelines for Verizon New York Inc., Conforming Tariff, and Requiring Additional Performance Reporting, Cases 00-C-2051 and 92-C-0665, Opinion No. 01-1, NYPSC, June 15, 2001, p. 10.

[154] News Release, "Verizon Communications Second Quarter Earnings Highlighted by Strong Long-Distance and Wireless Sales," http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=59168 (July 31, 2001).

[155] *Deployment of Wireline Service Offering Advanced Telecommunication Capability,* 13 FCC Rcd 24012, 24029, ¶ 35 (1998) ("Advanced Service Order"). See also Comments of PacBell, CC Docket No. 98-103, filed Sept. 11, 1998, p. 14 ("ADSL is clearly a 'telecommunications service' that will be used to originate and terminate interstate telecommunications.")

[156] *Id.*

B. Factors Other Than Regulation Fully Account for the Pace of Broadband Deployment

To the extent broadband is not being deployed quickly enough, which is not the case according to the Commission's *Advanced Services Reports*[157], this is attributable to factors other than common carrier regulation of wireline broadband services. First, there are no services for which wireline broadband networks more advanced than those already in place are necessary. This phenomenon is referred to as the lack of a "killer application." Video programming is available from several sources including over-the-air broadcast, cable, satellite, videocassettes and DVDs. High speed web browsing is already available through DSL and cable modem service, although these services are not necessarily substitutes for each other. Businesses have been able for years to obtain the high-speed services they need from ILECs in the form of DS-1 and higher speed services. In short, futuristic ubiquitous wireline broadband networks have not been built because there is insufficient demand for them.

In a refreshing change from ILEC and other government views, it was recently reported that the Administration has recognized that demand, not supply, is limiting the growth of broadband networks (again, assuming that they are not being deployed fast enough, which is not the case).[158] Glenn Hubbard, Chairman of the President's Council of Economic Advisors stated:

> "Many consumers don't yet see the value of broadband," he said, pointing to the fact that in Atlanta, [a] price point of zero still wasn't sufficient motivation for half of consumers. As far as Bush

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[157] *Advanced Services Order, 13 FCC Rcd 24011* (1998).

[158] "Bush Administration Focuses on Increasing Demand for Broadband," Communications Daily, March 6, 2002, p. 3.

> Administration is concerned, he said, policy decisions can have "bigger impact on the demand side ..."[159]

Second, ubiquitous advanced broadband networks have not been built because the technical solutions that might make them affordable have not yet been invented. Recent studies show that consumers are unwilling to pay more than $25.00/month for high speed access and that this explains why less than 5% of U.S. households subscribe to it.[160] The ILECs have dangled the prospect of a kind of super-broadband "passive optical network," bringing fiber optics as close to consumers as possible.[161] But given that the ILECs' own funded studies estimate that the cost of deploying such gold-plated networks nationwide would be $270 billion to $416 billion,[162] it is clear that this type of network is not currently economically feasible.

Accordingly, even if the Commission were to comprehensively deregulate ILECs' participation in the wireline broadband marketplace, there is no reason to believe that this would result in widespread deployment of more advanced wireline broadband networks, simply because the costs thereof are more than consumers are willing to pay. In fact, ILECs will not build these futuristic networks unless costs drop dramatically or they are permitted to compel all ratepayers to pay for them through cross-subsidies and general rate increases.

In fact, the Commission itself has provided an explanation for the recent slowdown in the pace of increased investment in broadband networks:

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[159] *Id.*

[160] "Broadband Success Requires More than Regulatory Clearance, Says Research," CLEC News, February 21, 2002, http://www.c.ec-planet.com/news/02feb2002/18broadband.html

[161] Communications Daily, February 26, 2002, at 4-5, describing *Building a Nationwide Broadband Network: Speeding Job Growth*, Telenomic Research, February 25, 2002.

> [I]ndustry investment in infrastructure to support high-speed and advanced services has increased dramatically since 1996. Analysts forecasted at that time that this upward trend would continue, spurred by the introduction of competition into the market. Although analysts still generally expect this trend to continue, they observe that there has been a recent slowdown in investment caused by the economic downturn generally and, more particularly, over-building by carriers, over-manufacturing by vendors, over-capitalization by financial markets, coupled with unrealistic market expectations by investors.[163]

Therefore, there is no basis for the Commission to conclude in this proceeding that removal of common carrier regulation from ILEC broadband capability would promote its broadband goals.

C. ILECs Have Strong Internal Incentives Not to Deploy Innovative Retail Broadband Services that will Benefit Consumers

Although only ILECs possess ubiquitous wireline networks that can be used to provide services to consumers and businesses, they are not the best source of innovation in provision of services over those networks. In fact, ILECs are slow to roll out new services, and have strong incentives not to deploy, new, efficient services that will compete with, and cannibalize, existing services. Thus, CLECs, in contrast to ILECs, worked cooperatively with their BSP customers to serve BSP needs for stable platforms that promoted research and development. Independent BSPs in turn, have been a key driver in the development and deployment of new advanced services. BSPs pioneered a myriad of advanced services, such as Internet telephony, unified messaging, and MP3 technology, that promise to revolutionize the telecommunications industry.

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162 *Id.*

163 *Third Section 706 Report* at ¶ 62 (footnotes omitted).

Moreover, the BSPs pioneered the self-installation technologies that made DSL connectivity a viable consumer technology adopted quickly by all of the ILECs.

ILECs' pattern of deployment of DSL capable networks perfectly illustrates that ILECs are not sources of innovation and prefer to maintain revenues from existing services. In a nutshell, ILECs ignored DSL until CLECs began to deploy it. As President Clinton's Council of Economic Advisers stated in early 1999:

> Although DSL technology has been available since the 1980s, only recently did [the ILECs] begin to offer DSL service to businesses and consumers seeking low-cost options for high-speed telecommunications. The incumbents' decision finally to offer DSL service followed closely the emergence of competitive pressure from ... the entry of new direct competitors attempting to use the local-competition provisions of the Telecommunications Act of 1996 to provide DSL over the incumbents' facilities.[164]

Or, as stated more succinctly by James Glassman, the ILECs "kept cheaper DSL on the shelf for a decade" to protect their higher revenue services.[165] That decision is unsurprising and perhaps even economically rational from the ILECs' point of view, but consumers and businesses were required to bear the higher costs and poorer quality of the ILECs' earlier "high speed" services.

Moreover, it is not coincidental that after two of the "big three" CLEC DSL providers terminated operations and the third filed for bankruptcy, some ILECs announced they were

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[164] ALTS New Economy Analysis at 4 (citing Council of Economic Advisers, Economic Report of the President, February 1999, pp. 187-188, http://w3.access.gpo.gov/usbudget/fy2000/pdf/erp.pdf).

[165] James Glassman, "Best Remedy for Recession? Break Up the Bells," http://www.techcentralstation.com/NewsDesk.asp?FormMode=MainTerminalArticles&ID=131 (December 10, 2001).

scaling back DSL investment somewhat – although even this maneuver did not prevent them from achieving the record-breaking growth discussed above, so that they now control over 90% of DSL customers.[166] For example, in October 2001, SBC scaled back its original deployment plan for Project Pronto and reduced capital spending by 20% in 2002. [167] In short, to the extent any diagnosis other than the general recession is needed to explain these modest scalebacks, it is apparent that ILECs no longer feel the need to invest quite so rapidly in light of the diminished threat of competition from CLECs. It is also worth noting that some ILECs substantially raised prices for DSL service, which never would have happened in a competitive market. To name only one, in October 2001, SBC raised its wholesale prices for DSL services by approximately 15% (while admitting that its cost to provide DSL was declining).[168]

As a group of distinguished economists explained in a December 2001 letter to Commerce Secretary Donald Evans: "both history and economic theory have taught us [that] deregulating a monopoly without genuine prospects for competition does not induce it to deploy more infrastructure, only to exploit more severely the infrastructure that it has already in place by

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[166] New York Times, August 6, 2001, at C1 "Bell Companies Blamed for D.S.L.'s Woes."

[167] SBC Advanced Solutions, Inc., Tariff FCC No. 1, pp. 60-69 (eff. Sept. 10, 2001); SBC Second Quarter Briefing, at 5.

[168] SBC Investor Briefing, "Second-Quarter Diluted Earnings Per Share Increases by 8.9% with Focus on Disciplined Financial Management," Growth Drivers (July 25, 2001) at 5 ("SBC continues to improve the economics of DSL. Acquisition costs have declined by more than 25 percent since the fourth quarter of 2000 due to modem cost reductions and operational improvements." http://www.sbc.com/Investor/Financial/Earning_Info/docs/2Q_IB_FINAL_Color.pdf (viewed March 1, 2002)).

limiting its use and raising its price."[169] In a perfect illustration of this point, SBC reduced investment and raised prices as soon as the threat of broadband competition diminished.

The *NPRM* fails to acknowledge that it is competition, not deregulation, that best motivates ILECs to invest in broadband and that it is the availability of incumbent networks on a common carrier unbundled basis to ISPs that permits them to provide services that can compete with ILECs. Accordingly, the Commission should conclude that requiring ILECs to provide broadband facilities to ISPs as part of Title II obligations will help achieve the competition that can best encourage ILECs to build broadband networks.

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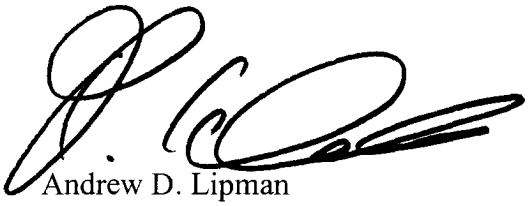
[169] Letter from William J. Baumol *et al.* to Honorable Donald L. Evans *et al.*, dated December 11, 2001, at 3.

X. CONCLUSION

For the reasons stated herein, the Commission should conclude this proceeding consistent with DIRECTV Broadband's recommendations.

Respectfully submitted,



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